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VOL. 86—INDIANA REPORTS

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM A. WOODS.* †
HON. WILLIAM E. NIBLACK. ‡
HON. GEORGE V. HOWK. ‡
HON. BYRON K. ELLIOTT. †
HON. ALLEN ZOLLARS. ‡

* Chief Justice at the November Term, 1882.

† Term of office commenced January 3d, 1881.

‡ Term of office commenced January 1st, 1883.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.†

• Chief Commissioner.

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

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OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1882, IN THE SIXTY-
SEVENTH YEAR OF THE STATE.

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No. 9577.

KECK v. NOBLE ET AL.

MARRIED WOMAN.—*Husband and Wife.—Wife's Inchoate Interest Under Act of 1875.—Bankruptcy.—Judicial Sale.*—The act of 1875, whereby a wife's inchoate interest in realty is made absolute upon the transfer of the husband's title by judicial sale, applies to equitable as well as legal estates of the husband; as where the husband, holding a certificate of purchase of school land goes into bankruptcy, and the assignee pays the remainder of the purchase-money and takes a conveyance to himself as assignee.

SAME.—*Judgment of U. S. District Court.—Appeal.—Statute Construed.*—The assignee in bankruptcy of the plaintiff's husband brought suit in the U. S. District Court, to enjoin her from asserting claim under the act of 1875 to real estate of the bankrupt, and, upon the report of the master, obtained such decree; afterwards, at the same term of court, she obtained a rehearing, upon which the court again overruled her exceptions to the master's report, and ordered that said report stand as the final decree of the court, saving her right of appeal, which appeal she perfected within ten days; during the pendency of this appeal the assignee obtained of said court an *ex parte* order for the sale of said realty, and sold the same to the appellant.

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Held, that the appeal was taken in time, and that the order of sale so obtained did not bar her claim; sec. 533 of the code of 1852 (R. S. 1881, sec. 669) not applying to such a case.

From the Hamilton Circuit Court.

F. M. Trissal, W. Neal and J. T. Neal, for appellant.

T. J. Kane, T. P. Davis, D. Moss and R. R. Stephenson, for appellees.

WOODS, C. J.—Under the act of March 11th, 1875, the appellee Rachel Noble claimed the one-third in fee of certain real estate, and obtained a judgment in partition that it be set off to her. The appellant insists that the law of 1875 does not apply, because her husband, who had gone into voluntary bankruptcy, and whose interest in the land had been transferred to his assignee in bankruptcy, and by him sold and conveyed to the appellant, did not own, and never had owned, the legal title, but held only a certificate of purchase thereof issued by the school commissioner of Hamilton county, where the land is situate.

The proposition asserted by the appellant is, that the act of 1875 does not apply unless there has been a transfer, by means of a judicial sale, of the legal title from the husband to the purchaser; that, unless the husband has the legal estate, the wife can have no inchoate right by virtue of the marriage.

In the case of *Ketchum v. Schicketanz*, 73 Ind. 137, the husband had never had the legal estate, but had purchased the land at a sheriff's sale, and had received a certificate of the purchase, and, after assigning the certificate to his son, had gone into voluntary bankruptcy; and the assignment to the son having been set aside as fraudulent at the suit of the assignee, and the land conveyed, under the order of the court, by a commissioner to the assignee, the wife claimed and was allowed under the statute to take one-third, as if her husband had died seized. In the opinion in that case it is said: "When, therefore, the equitable interest of a husband in a tract of land is sold and conveyed away, under a judicial proceeding, his wife becomes immediately and absolutely entitled to one-

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third of such land as against the purchaser, provided the value of the land does not exceed ten thousand dollars."

In this case it is shown that the assignee, under the order of the bankrupt court, paid the remainder due upon the land to the school fund, and took a deed therefor in his own name; and in accordance with the decisions in *Ketchum v. Schickeltanz*, *supra*, and *Roberts v. Shroyer*, 68 Ind. 64, it may well be said that the title of the bankrupt became a perfect legal title, and at the same instant was transferred to the assignee.

In his second paragraph of answer to the appellee's petition for partition, the appellant, after stating the facts already rehearsed in this opinion, alleged further, that, "After procuring the title as aforesaid the assignee presented his petition to the district court, asking an order for the sale of the land, which order was granted, and in pursuance thereof the assignee advertised the same for sale at public auction, and on the day and at the place fixed for the sale the defendant (appellant) was present to compete with other bidders, and to purchase the tract of land; and the plaintiff Rachel, when the same was offered for sale, notified all persons intending to bid that she was by law, as the wife of William F. Noble, entitled to a one-third interest therein, which would accrue to and become vested in her whenever a sale should be made by said assignee; and that she would assert her claim, and demand her said interest against any person who might become the purchaser; in consequence of which notice there was no sale upon said day for want of bidders.

"Thereupon the assignee, as this defendant (appellant) at the time well knew, immediately filed in said district court his bill in chancery, making said Rachel Noble a party defendant; in which bill all the facts hereinbefore set forth were stated, and the pretended interest of said Rachel in the lands, then existing or that might accrue after a sale by the assignee, was therein and thereby controverted and denied, and an issue as to the validity of such title and claim of said Rachel was thereby tendered; and a part of the relief prayed for in the

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bill was an injunction forever restraining and enjoining said Rachel from in any manner asserting any claim or interest in and to said tract of land, either against the assignee or the purchaser from him.

“That said Rachel, on the 25th day of September, 1878, appeared to the bill and filed her demurrer thereto, and afterwards filed her answer reasserting her claim to an interest in said land; whereupon the cause was, by the district court, upon the issues aforesaid, referred to a master in chancery, who, after hearing and considering all the allegations, proofs and arguments, made and filed his report sustaining the bill, and finding that the assignee was entitled to the relief prayed for. Afterwards, on the 23d day of May, 1879, said Rachel filed in said court her exceptions to the report of said master, which exceptions were afterwards, on the 12th day of July, 1879, overruled, and a decree was then duly entered by the court in accordance with the report and findings of the master and the allegations and prayer of the bill. After the entry of this judgment and decree, and while the same was in full force and effect, unappealed from and unreversed, and before any steps had been taken by said Rachel, as by law and the rules in equity required, indicating her purpose to appeal from the decree, and after the ten days allowed by law in which to appeal had expired, to wit, on the 31st day of July, 1879, the assignee presented a petition again asking authority to sell said real estate, which petition was granted; and in pursuance of the order of sale then entered, the assignee, on the 25th day of August, 1879, again offered said real estate for sale at public auction, and this defendant (appellant) well knowing of all the facts and proceedings heretofore mentioned, relying upon the fact that the judgment and decree in said injunction suit was in full force and unappealed from, and further relying upon the verity and conclusiveness of the same as to the rights of said Rachel, purchased, and in good faith paid to the assignee the full value of said land, to wit, the sum of \$4,600; and the sale having been duly confirmed, the assignee exe-

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cuted to him a deed for the land, which he still holds; wherefore he asks that his title be quieted, and for such other and further relief as he may be entitled to," etc.

To this answer the appellee replied in substance, that on the 2d day of August, 1879, at the term at which the master's report was filed, she filed a motion to modify the decree of the District Court in the cause; and afterwards, on the 31st day of October, 1879, and at the same term of the court, she filed her petition asking a rehearing and reargument of the action of the court in overruling her exceptions to the master's report, and thereupon the court granted her a rehearing; that afterwards, on the 23d day of December, A. D. 1879, the court overruled her exceptions to the report and ordered that the master's report stand as the final order and decree of the court, saving her right to appeal; and she thereupon at the time excepted to the action of the court and prayed an appeal to the Circuit Court of the United States, which was thereupon duly granted and perfected on the 26th day of December, and afterwards, on the 30th day of March, 1880, the cause coming on for hearing in the circuit court, that court rendered the following judgment, to wit:

"Now this day this cause comes on to be heard, and, the court having heard argument of counsel and considered the same, it is ordered, adjudged and decreed by the court that the decree of the District Court heretofore rendered in this cause be and the same is hereby in all things reversed, and that the bill of complaint of complainant, assignee, be dismissed for want of equity, at the costs of the estate of William F. Noble, bankrupt, this court being of opinion that Rachel Noble, wife of William F. Noble, bankrupt, is entitled to an undivided one third of the real estate in controversy in this action, held by said William F. Noble as an equitable estate at the time of his adjudication as a bankrupt, subject to one-third of the unpaid purchase-money due upon said real estate at the time said unpaid purchase-money was paid by the assignee of William F. Noble."

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And she further avers that said Valentine Keck was, at and during the times and proceedings herein mentioned, and at the time of his purchase of said real estate, one of the principal creditors of William F. Noble in the matter of said bankruptcy; that after the rendition of the order and judgment of the circuit court, and in pursuance thereof, she tendered and paid to the assignee one-third of the unpaid purchase-money due upon said real estate at the time said unpaid purchase-money was paid by the assignee; that afterwards, on distribution of the estate, including the amount that had been paid by her to the assignee Keck, as one of the creditors, accepted and received his interest therein with full knowledge of all the facts and matters herein stated, and has never refunded or offered to refund any part of the amount so received by him on account of the money paid by her to said assignee; that, long before Keck purchased said real estate, he had full notice of her claim and of her intention to prosecute the same, and at the time and on the day of the purchase, and before he had paid the purchase-price therefor or any part thereof, she notified him that she was still claiming and intended to hold her interest, and intended to appeal from the decision of the district court to the circuit court, and to take such steps as might be necessary to protect her interests; that she was never a party to any of the proceedings or orders for the sale of said real estate; that, on and after the rendition and decision of the master in chancery and the district court against her, she took such steps, and appealed therefrom in such time, as in such cases by law and the rules in equity provided; all of which more fully appears, reference being had to the record of such proceedings.

The appellant insists that his demurrer for want of facts to this reply should have been sustained.

A part of the argument is, that the appeal from the decision of the district court was not taken in time nor according to the rules of the court. This raises a collateral enquiry, upon which we need not enter, as it is to be presumed that

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the appeal was properly taken, else the circuit court would not have entertained it. But it is shown in the reply, that, at the same term of court at which the decision was made, the appellee asked and obtained a rehearing, and in the final order the right of the appellee to appeal was expressly saved; and from this final decision it is shown that an appeal was duly granted and perfected. It is therefore clear that the appeal was duly prosecuted.

Counsel next say: "We claim that the rights of a purchaser at a judicial sale will not be affected by a subsequent reversal of the judgment;" and in support of the proposition cite the 533d section of the code, R. S. 1881, section 669, and numerous decided cases.

We do not question the proposition, but deem it inapplicable. The rule declared in the code is, that "The reversal of any judgment by virtue of which any real estate has been sold or transferred, or the title thereto affirmed, shall not avoid the sale, transfer, or title, if the person to be affected thereby shall be, or claim under, a purchaser in good faith, and not a party to the record or attorney of any party."

The order upon which the assignee made the sale to the appellant was an *ex parte* order, to which the appellee was not a party, and of which it is not alleged that she had notice. The sale was not made by virtue of the judgment which was appealed from, and it is affirmatively shown that the appellant, when he made his bid, and before he paid the price of his purchase, had full notice of the appellee's purpose to prosecute her appeal, and to assert her claim in all possible ways, so that he has no reasonable ground of complaint.

Judgment affirmed.

Petition for a rehearing overruled.

Board of Comm'rs of the County of Decatur v. The State, *ex rel.* Hamilton.

No. 10,519.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF DE-
CATUR v. THE STATE, EX REL. HAMILTON.

RAILROAD.—*Public Aid. — Mandate. — County Commissioners. — Relator.*—A township had regularly voted aid for the construction of a railroad in a definite sum, as authorized by statute, R. S. 1881, section 4045. A tax of one per cent. upon the taxables of the township was levied for two years successively to raise the sum appropriated, as the statute provides, section 4056; but, owing to a shrinkage in the aggregate of taxables, these levies did not produce money sufficient to meet the whole sum appropriated.

Held, that mandate would lie to compel the board of county commissioners to make the necessary additional levy.

Held, also, that a taxpayer of the township was a proper relator to prosecute the suit. Woods, J., dissents, and Howk, J., doubts.

From the Decatur Circuit Court.

W. A. Moore, B. F. Bennett and W. H. Goddard, for appellant.

C. Ewing, O. Ewing, Jr., and J. K. Ewing, for appellee.

NIBLACK, J.—This was a proceeding by the State, on the relation of William W. Hamilton, against the board of commissioners of the county of Decatur, for a mandate to compel the levying of certain taxes charged to have been voted for the construction of a railroad. R. S. 1881, section 1167, *et seq.*

The complaint upon which the proceeding was based stated, that, on the 19th day of July, 1879, a petition was presented to the said board of commissioners, purporting to be signed by twenty-five freeholders of Washington township, in said county of Decatur, asking that such township be required to aid in the construction of the Vernon, Greensburgh and Rushville railroad by an appropriation of \$75,000, to be invested in the stock of the company organized to construct said railroad; that thereupon said board ordered an election to be held in said township of Washington, on the 25th day of August, 1879, which election was held accordingly; that the result of

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that election, as ascertained and declared, was, that a majority of the voters of that township voted in favor of the proposed appropriation; that the taxable property of that township for the year 1878, as shown by the tax duplicate, amounted to the sum of \$3,867,635, and for the year 1879, as shown in like manner, to the sum of \$3,814,245; that said board, at its regular session in June, 1880, levied a tax of one per cent. on the taxable property of the township, and, at its June session in 1881, made a like levy, to raise money to pay the appropriation voted as above; that of the taxes so levied the sum of \$52,400 has been collected and paid over to the proper railroad company, and the sum of \$15,600 remains on the proper tax duplicate uncollected; that after said levies of taxes are wholly exhausted, there will remain approximately the sum of \$7,000, voted as an appropriation from said township, unlevied, and due the railroad company on account of the same; that the taxable property of said township for the year 1882 amounts to about the sum of \$3,500,000; that, on the said 19th day of July, 1879, a petition was also presented to said board, purporting to be signed by twenty-five freeholders of Clinton township, of said county of Decatur, asking an appropriation from said township of the sum of \$11,000 to aid in the construction of said Vernon, Greensburgh and Rushville railroad, by taking stock to that amount in the railroad company organized for the construction of such railroad; that thereupon said board also ordered an election to be held in said township of Clinton, on said 25th day of August, 1879, and the result of said election, as ascertained and declared, was that a majority of the duly qualified voters of said township had voted in favor of the appropriation prayed for in the petition; that the taxable property of said township for the year 1878, as shown by the proper tax duplicate, amounted to \$574,920; and for the year 1879, as thus shown, to \$591,030; that said board, at its regular June session in 1880, levied a tax of one per cent. on the taxable property of said township of Clinton, and, at its June session of 1881, made an-

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other and like levy of one per cent. on said taxable property, to raise money to pay said appropriation from said township; that of said last named levies of taxes the sum of \$7,400 has been collected and paid over to the proper railroad company, and the sum of \$2,400 remains uncollected; that, after this last named sum shall be collected and paid over as required by law, there will remain approximately the sum of \$1,200 of the amount so voted as an appropriation by Clinton township, unlevied and unprovided for; that the taxable property of said township for the year 1882 amounts to about the sum of \$500,000; that said railroad has been fully constructed and completed, and the cars are running regularly over the same through said townships of Washington and Clinton, and that said railroad was so constructed and completed largely upon the faith of the appropriations voted by said townships in aid thereof, as above set forth; that said board had, at its June session of 1882, been requested to levy a tax of one-fifth of one per cent. on each one hundred dollars' worth of taxable property in said township of Washington, and to also levy a tax of one-fourth of one per cent. on each one hundred dollars' worth of taxable property of said township of Clinton, for the year 1882, to make up the deficiencies in the amounts heretofore levied to pay the appropriations due from said townships respectively; but that said board had refused to make any levy of taxes to make up such deficiencies; that the relator, Hamilton, was a resident of said township of Washington, and the owner of taxable property in that as well as in Clinton township, and one of the signers of the petition asking for an appropriation from Washington township in aid of the construction of the railroad herein above named. Wherefore an alternative writ of mandate against the board of commissioners was demanded.

The board waived the issuing of the writ against it, and, voluntarily appearing to the action, demurred to the complaint for the alleged insufficiency of the facts relied upon as a cause of action. The demurrer was, however, overruled, and, the

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board refusing to answer further, final judgment was rendered against it, ordering it to make additional levies to supply deficiencies in former levies, as it was requested to do at its June session of 1882.

The only question we are required to decide is, was the complaint sufficient upon demurrer to entitle the relator to a writ of mandate against the commissioners?

The first objection made to the complaint, in its natural order, is, that a writ of mandate is not the appropriate remedy in the class of cases to which this belongs; that the levying of taxes in a case like the one now presented involves the exercise of a discretion *quasi-judicial* in its character, and of a kind which the courts can not control by the issuance of such a writ to the tribunal possessing the necessary power to levy the required taxes. The authorities do not, however, sustain the position which the appellant thus seeks to maintain.

The code of 1881 provides that "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station." R. S. 1881, sec. 1168.

This provision is a simple re-enactment of a precisely similar section of the code of 1852, and confers upon the courts of this State all the powers pertaining to writs of mandate which have usually been exercised by courts in other jurisdictions in the issuing and enforcement of writs of *mandamus*.

High, in his work on Extraordinary Legal Remedies, after referring to the power of the courts to require the performance of certain duties by municipal bodies, at section 382, says: "We come next to a consideration of the principles upon which the taxing power of municipal corporations may be set in motion, to meet their obligations incurred by municipal subscriptions in aid of railway and other kindred enterprises of a quasi-public nature. And it is to be premised that where municipal officers have, by authority of law, pledged the faith of the municipality in aid of such enterprises,

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and have issued municipal bonds in payment of their subscriptions to the capital stock, the duty of levying a tax to meet such obligations is merely a ministerial duty, unattended with the exercise of any special discretion. And the rule may now be regarded as too firmly established to admit of doubt, that where municipal corporations are authorized by law to subscribe to the stock of railway companies, and to issue their bonds in payment of such subscriptions, and are also required to levy a tax in payment of the interest upon bonds thus issued, mandamus will lie on behalf of the bond-holders, to compel the corporate authorities to levy the necessary tax in payment of the interest on such bonds. The conditions requisite to the exercise of the jurisdiction in this class of cases are, a clear, legal right in the owners of the bonds, coupled with a corresponding duty on the part of the municipal authorities to provide the means of payment, and the want of any other adequate and specific legal remedy." See, also, section 389.

The conclusions thus reached by this author rest upon, and are well supported by, many well considered and leading cases, and, in principle, fully sustain the authority of the courts to issue and enforce writs of mandate in cases like the one before us. *Huntington v. Smith*, 25 Ind. 486; *Ex Parte Loy*, 59 Ind. 235; *Jessup v. Carey*, 61 Ind. 584; *Mayor, etc., of Kokomo v. State, ex rel.*, 57 Ind. 152; *Potts v. State, ex rel.*, 75 Ind. 336; *Commonwealth v. City of Pittsburgh*, 34 Pa. St. 496; *Flagg v. City of Palmyra*, 33 Mo. 440; *People v. Mead*, 24 N. Y. 114.

The authorities are somewhat conflicting as to who may be a relator in a case like this, but the decided weight of authority is to the effect that where the question is one of public concern, and the object of the mandate is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result sought to be accomplished. In such a case it is only necessary that the relator shall be a citizen, and as such interested in the execution

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of the laws. High Extraordinary Legal Remedies, sec. 431. This court is in accord with the weight of authority declared as above, and the doctrine thus announced as to relators has long been recognized as a correct exposition of the law on that subject in this State. *Hamilton v. State, ex rel. Bates*, 3 Ind. 452; *Board of Comm'rs of Clarke Co. v. State, ex rel. Lewis*, 61 Ind. 75.

The next and only remaining objection to the complaint is, that, as the levies of taxes for the years 1880 and 1881 amounted to the aggregate sum of two per cent. on the taxable property of the townships of Washington and Clinton, respectively, the power of the board of commissioners to levy taxes to pay the appropriations voted by those townships is exhausted, and that, as the deficiencies in such levies of taxes to pay those appropriations have resulted from shrinkage in the value of the taxable property of the respective townships, a contingency has arisen for which no adequate provision has been made by law, and, consequently, for which no legal remedy has been provided.

By the act of May 12th, 1869, concerning the construction of railroads, as amended by the act of March 8th, 1879, and which is still in force, the several townships of the State were, by certain proceedings upon petition before the boards of commissioners of their respective counties, and by a majority vote of their qualified voters, authorized to take stock in, or to make donations to, railroad companies, to aid in the construction of their roads by appropriating a specified sum for the purpose intended, "not exceeding, however, two per centum upon the amount of the taxable property of such township on the tax duplicate of the county delivered to the treasurer of the county for the preceding year." 1 R. S. 1876, p. 736; R. S. 1881, sec. 4045 *et seq.*; Acts 1879, p. 46. Section 12 of that act declares that "If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax

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of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the * * township * * * * * liable to taxation for State and county purposes, which tax shall be collected in all respects as other taxes are collected for State and county purposes; and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

Section 13 of the same act further declares that "No township shall be authorized by the provisions of this act to appropriate to railroad purposes, or to raise by taxation for such purpose, to exceed two per centum upon the taxables of such township, as said taxables shall appear upon the tax duplicate of the county, in any one period of two years."

These sections, when taken in connection with other sections of the same act, and particularly with the 1st section, must be construed as meaning that not more than two per centum of the taxable property of a township, as estimated by the tax duplicate of the preceding year, can be appropriated at any one time to aid in the construction of a railroad; nor can more than two per cent. of such taxable property be levied upon the property of the township within a period of two years; but that when an appropriation of not exceeding two per centum of the value of the taxable property of the preceding year has been lawfully made, such an appropriation becomes a binding obligation upon the township, from which it is not discharged by any subsequent shrinkage in the value, or the destruction of any part, of its taxable property.

Where an appropriation is once made, the only limitation upon the taxing power of the board of commissioners to meet and to pay it is, that not more than two per centum of the assessed value of the taxable property of the township shall be levied in any one period of two years.

This was the construction practically given to that act in the cases of *Brokaw v. Board of Commissioners, etc.*, 73 Ind.

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543, and of *Gavin v. Board of Commissioners, etc.*, 81 Ind. 480, and more particularly in the latter case, and is the only one, in our estimation, which will fully carry into effect the obvious intention of the Legislature in making the enactment.

We have only examined the complaint with reference to the objections made to it, and, considered with reference to those objections, it appears to us to have been sufficient upon demurrer.

The judgment is affirmed, with costs.

Howk, J., doubts.

DISSENTING OPINION.

WOODS, C. J.—The principal case shows that the special power given by law to levy taxes for the payment of the appropriation was exercised and exhausted in the manner prescribed by the statute. There is, therefore, no authority for a further levy under the statute. If the unpaid part of the appropriation is a legal obligation against the township, it is one in favor of the railroad company to which the aid was voted, and must be enforced by it in such modes as are known to the practice. Conceding the obligation to be such, I am clear that the relator had no right to bring any action for its enforcement—certainly not this action, which seeks a special levy of a tax for which there is no statutory authority. See *City of Connersville v. Connersville Hydraulic Co.*, *post*, p. 235. If an enforceable obligation, the railroad company might have sued upon it, and have obtained an ordinary judgment for its collection. The county commissioners have no more power to levy a special tax for its payment than for the discharge of any other legal or equitable liability of the township to pay money. The township may have money on hand sufficient to pay the demand, and may be ready and willing to pay it, especially when once the proper court shall have declared it bound to do so. No refusal to pay is alleged, and consequently no reason is shown for seeking an extraordinary remedy; certainly not the one sought and awarded in this instance.

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The 17th section of the railroad aid law expressly provides that any one of the petitioners, or any taxpayer of the county or township may, by mandate, compel the payment of money collected under the law to the company for whose aid the same shall have been levied and collected; and this court has declared that, under this provision, the company can not prosecute a mandate. "It is expressed as to who may have a mandate, and this expression excludes all others." *Board, etc., v. Louisville, etc., R. W. Co.*, 39 Ind. 192. Under this construction of the law, it is clear that if there had been a failure and refusal by the county board to levy the particular taxes provided for in the act, the relator could have compelled such levies by mandate; but when it is proposed to go beyond the specific taxes authorized by this statute, and under the extraordinary powers of the courts, to compel the levy of taxes for the discharge of a legal liability, it is evident, granting the existence of such liability, that the creditor must apply for the writ. It is not a case for "the enforcement of a purely public right, where the people at large are the real party in interest." In the legal sense, "the relief is sought merely for the protection of private rights," and "the relator must show some personal or special interest in the subject-matter, since he is regarded as the real party in interest and his rights must clearly appear." High Extraordinary Legal Remedies, sec. 431.

But this court, as well as the Supreme Court of Kansas, has decided, and Mr. High, at section 390 of his work, cited *supra*, recognizes the soundness of the distinction, that the mere vote of the electors of a county or township, authorizing the donation or subscription, does not establish a contract relation between the municipal corporation and the railway company. In *Board, etc., v. Louisville, etc., R. W. Co.*, *supra*, this court said that "All the acts of the commissioners and the voters of the county, in taking steps to raise the money, are between themselves, one the principal and the other the agent; there is no contract with the company, nor had she any

right in, or control over, the matter, till the money is raised and the stock taken." This doctrine is not confined to counties, nor does it rest on the constitutional restriction against the taking of stock by counties without paying the money down. On the contrary, this court has repeatedly applied the same rule to the acts of townships, in voting aid to railroads, under the same statute. *Sankey v. Terre Haute, etc., R. R. Co.*, 42 Ind. 402; *Petty v. Myers*, 49 Ind. 1; *Jager v. Doherty*, 61 Ind. 528; *Bittinger v. Bell*, 65 Ind. 445. To same effect, *Union Pacific R. W. Co. v. Commissioners, etc.*, 6 Kan. 256.

The theory of these decisions in this respect, as substantially expressed in the Kansas case, is, that the people of a county or township can not, in their primary capacity, enter into contract relations binding upon the municipality, but must act through their duly constituted agents or officers. The agent, under our statute, is the proper county board; and while in this instance it is shown that the petition and vote were for sums to be invested in the stock of the proposed railroad company, it is not alleged that the board of county commissioners had made, for the townships concerned, a subscription to the stock of the company in any sum whatever. There was, therefore, no contract, or legal liability, which the company, in its own behalf, could enforce.

The principal opinion, as it seems to me, involves a departure, which ought not to be taken, from soundly decided cases.

No. 9401.

GARDNER ET AL. v. HANEY ET AL.

MUNICIPAL BONDS.—*Payable to Bearer.*—*Negotiable by Delivery.*—*Sufficiency of Complaint.*—Municipal bonds, payable to bearer, are negotiable by delivery, and in an action thereon the complaint will be sufficient, if it

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allege that the plaintiff is the owner and holder thereof, and need not show how he acquired his title thereto.

MANDATE.—*Adequate Legal Remedy.*—*Statutory Rule.*—As a general rule, a proceeding by mandate will not be sustained where the plaintiff has an adequate legal remedy; but, under section 1168, R. S. 1881, a writ of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust or station.

INCORPORATED TOWNS.—*Bonds for School Buildings.*—*Payment of Interest and Principal.*—*Special Additional Tax.*—*Duty of Trustees.*—*Mandate.*—Under section 4190, R. S. 1881, it is the duty of the trustees of an incorporated town to levy annually a special additional tax sufficient to pay the interest and principal of the bonds of the town issued for school buildings, and falling due; and where it appears that the trustees of the town have failed, neglected and refused to discharge their statutory duty, a writ of mandate is the proper legal remedy.

CONSTITUTIONAL LAW.—*Title of Act.*—*Bonds Legalized.*—Section 4 of the act of March 8th, 1873, authorizing cities and towns to negotiate and sell bonds for the erection and completion of school buildings, which section legalizes and validates such bonds as had been executed under prior statutes, is matter properly connected with the subject expressed in the title of such act, and is a constitutional and valid section.

SCHOOL CORPORATION.—*Incorporated Town.*—*Location of School-House.*—*Validity of Bonds.*—Each incorporated town is by law a school corporation, and, as a rule, the school-grounds and school-houses of such corporation should be located within the corporate limits of the town; but the bonds of such town, negotiated and sold to procure means for the erection and completion of a school-house for the town, are not *ultra vires* and void, merely because such school-house is not located within the corporate limits of such town.

CURATIVE STATUTE.—*Legalizing Elections in Incorporated Towns.*—*Constitutional Law.*—The act of March 13th, 1875 (Acts 1875, Spec. Sess., p. 74) to legalize the acts of boards of trustees and other officers of incorporated towns, where the inspectors of elections have failed to make the return of the election of such officers within the time prescribed by law, was not repugnant to any provision of either the State or Federal constitution, and, as a curative statute, was a constitutional and valid law.

SUPREME COURT.—*Reversal of Judgment.*—When it appears to the Supreme court that there are no errors or defects in the record of the cause which affect the substantial rights of the appellants, and that the merits of the cause have been fairly tried and determined in the court below, under the provisions of sections 398 and 658, R. S. 1881, the reversal of the judgment, in whole or in part, is positively forbidden.

From the Lake Circuit Court.

Gardner et al. v. Haney et al.

A. W. Reynolds, E. B. Sellers, M. M. Sill and T. F. Palmer,
for appellants.

F. Swigart, D. P. Baldwin, Q. A. Myers and D. B. Mc-
Connell, for appellees.

Howk, J.—This suit was commenced by the appellees against the appellants, in the White Circuit Court. The appellees were severally the owners and holders of certain municipal bonds, issued by the incorporated town of Monticello, and the appellants were the town of Monticello, James M. Gardner and others, trustees of the town, the school town of Monticello, William S. Bushnell, trustee of the school town, William R. Harvey, treasurer, and Benjamin Reynolds, marshal, of the town of Monticello. The object of the suit was to compel the appellants, by mandate, to levy a tax of fifty cents on each \$100 of taxable property, and \$1 on each taxable poll, within the limits of the town, and to collect such taxes and pay the same to the appellees, as the owners and holders of the bonds. Before the cause was put at issue the venue thereof was changed to the Newton Circuit Court, and afterwards to the Lake Circuit Court. There the trial of the cause by the court resulted in a finding for the appellees, the plaintiffs below, and judgment was thereon rendered, as prayed for in their complaint.

In this court the appellants have assigned a large number of supposed errors. Without setting out these errors at length, we will consider and decide the questions discussed by the appellants' counsel, which may seem to us to be fairly saved in and presented by the record. The case is before us on the pleadings, the evidence not appearing in the transcript of the record. We give from the brief of appellants' counsel, as preliminary to the consideration of the questions for decision, the following summary of the appellees' complaint:

“The complaint in substance alleges that on the 29th day of February, 1869, the trustees of the school town of Monticello, under and by virtue of the act of 1867, submitted to the

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trustees of the town of Monticello their petition, a copy of which is made part of the complaint, asking the appropriation of \$30,000, to be used in the building of a school-house for the use of the public schools of said town; that the trustees of said town did appropriate \$30,000 for said purpose; that to raise said sum the trustees of the town issued bonds, payable to different persons, named on the face of said bonds, or bearer; that said bonds bore ten per cent. interest from date, which was evidenced by coupons attached to and made a part of each; that the proceeds thereof were used by the said town of Monticello in and for the payment of and for work and labor and material purchased and used in the construction of a school-house in said town of Monticello; that said bonds were purchased by the appellees before the maturity thereof, for a valuable consideration, and that they are the holders and owners thereof, a copy of each of which is set out in the complaint; that they are all in the same language and figures; that a copy of one is as follows:

“ ‘ *Bond of the Corporation of the Town of Monticello, Indiana.*

“ ‘ No. ———

“ ‘ It is hereby certified that the corporation of the town of Monticello is indebted unto ————— or bearer, in the sum of one hundred dollars, due and payable ten years after date, with interest at the rate of ten per cent. per annum from date until paid. Interest payable annually, upon the presentation of the proper coupons hereto attached, to the treasurer of said corporation. This bond is made redeemable at the pleasure of the corporation after two years from the date hereof.

“ ‘ This debt is authorized by an act of the Legislature of the State of Indiana, passed and approved March 11th, 1867, entitled “An act to authorize cities and towns to negotiate and sell bonds, to procure means with which to erect and complete unfinished school buildings and pay debts contracted for erection of such buildings, and authorizing the levy and collection of an additional special school tax for the payment of

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principal and interest of such bonds," and was prescribed and authorized pursuant in all respects to the provisions of said act, and all other acts thereupon pertaining, by said town, at a regular meeting of the trustees of said corporation, on the 29th day of January, 1869.

"In witness whereof the president of the board of trustees of said corporation has hereunto set his hand and caused to be affixed the seal of said corporation, this — day of — 18—.

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Monticello
Corporation Seal,
White County, Ind.

 R. GREGORY, SAM'L HECKENDOM,
 Clerk. President.

"[Revenue Stamp.]

"*Countersigned and Registered.*"

"That all of said appellees are holders of such bonds without notice of any defects or irregularity in the issuing of said bonds, if any existed; that said corporation received full value thereof, and continued to pay interest for ten years; that said town is insolvent; that said bonds are due and unpaid; that the trustees of said town, the corporation of the school town of the town of Monticello, have failed, neglected and refused to levy or collect the funds to pay off and discharge said bonds; that Benjamin Ross is the treasurer of said town; that there is a large delinquency of special school tax of said town, which is applicable to the payment of these bonds, which the treasurer refuses to collect.

"On the 30th day of June, 1880, a supplemental complaint was filed alleging the following facts, which had arisen since the filing of the original complaint: That, since the suit was instituted, William R. Harvey had succeeded Benjamin Ross as treasurer; that there had been a change in the school trustees and town trustees, and that Benjamin Reynolds had been elected marshal; that, since the filing of the complaint, a large sum of special school tax had been collected by the treasurer and marshal.

In argument the appellants' counsel say: "In our opinion,

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the errors relied on by the appellants, trustees of the town of Monticello, and the town of Monticello, for a reversal of the judgment of the court below as to them, are presented by a discussion of the sufficiency of one of the answers filed by them to the complaint, to which the court sustained a demurrer, for the reason that, if the complaint is not good, the demurrer should have been overruled, even though the answer be bad; a bad answer is good enough for a bad complaint; and if the complaint is good and the answer good, the demurrer should have been overruled. We therefore call the attention of the court to the seventh paragraph of answer filed by the trustees of the town of Monticello and by the town of Monticello to the complaint." In this seventh paragraph of answer to the complaint and writ of mandate, the appellants, the trustees of the town of Monticello, James M. Gardner, Matthew Massena, Milton M. Sill, Samuel B. Bushnell and Richard Ives, and the town of Monticello, alleged in substance, that they admitted that the appellees were the owners and holders of the pretended bonds, made part of their complaint, but that such pretended bonds were void, for the following reasons: That, on the 29th day of January, 1869, a paper was presented to the persons then assuming to be the board of trustees of the town of Monticello, signed by the school trustees of the town, in substance as follows:

"To the Board of Trustees of the Corporation of the Town of Monticello, White County, Indiana:

"We, H. P. Anderson and Lucius Pierce, trustees of the school town of Monticello, submit to your honorable body the following report: 1. That the house now owned and used as a public school-house, in the town aforesaid, has become, from decay and age, unfit and unsuitable for the purpose aforesaid, and the trustees have not funds sufficient to build a school-house.

"2. That it is no longer large enough to accommodate the scholars within said corporate limits, and who are entitled to the benefits of said school.

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“3. That it has become necessary, for the reason aforesaid, to build a new and more commodious and healthful building.

“4. That said building, now concluded upon by the undersigned trustees, shall not cost less than \$10,000, and may, if necessary, cost more.

“Wherefore your petitioners say, that, in order to build and furnish the building as aforesaid, it will be necessary to raise a large amount of money; wherefore they pray your honorable board to issue bonds of the corporation aforesaid, to an amount not to exceed \$30,000, for the purposes aforesaid, and your petitioners will ever pray.”

This petition was subscribed by the school trustees and sworn to, before a notary public, on the 29th day of January, 1869, and filed on the same day with the clerk of the town board.

And that no other petition was at any time presented in relation to said subject-matter; and that, on the same day, the board of trustees passed an ordinance, in substance, as follows:

“Section 1. *Be it ordained by the trustees of the corporation of the town of Monticello, White county, Indiana, That, for the purpose of promoting and advancing educational interests in the town and county aforesaid, said board of trustees do hereby order issued to the school trustees of Monticello, White county, Indiana, twenty thousand dollars' worth of coupon bonds, of the denomination of one hundred dollars each, with interest at the rate of ten per cent. per annum from date, and the interest upon said bonds to be paid by the treasurer of said corporation, at his office in said incorporated town; and said bonds are made redeemable at the pleasure of said corporation after two years, and within ten years after the issue thereof.*

“Sec. 2. It is declared that an emergency exists for the immediate taking effect of this ordinance; therefore it shall be in force from and after its passage.”

And the appellants further said that no other ordinance was passed by said board, in relation to the issuing of said

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bonds; and no other authority was ever given or granted by the board of trustees of said town, or by said town, authorizing the issuing of said bonds; that said pretended ordinance authorized the issuing of said bonds to the school trustees of said town of Monticello; that said pretended bonds were issued in pursuance of said pretended ordinance, and delivered to the school trustees, under and by virtue of such pretended ordinance; that the said school trustees negotiated and sold the said bonds for a sum much less than ninety-four cents on the dollar, all of which facts were well known to the appellees when they purchased said bonds; that the persons assuming to act as the board of trustees of said town of Monticello, at said time, were Samuel Heckendom, William S. Haymond, John Saunders, Augustus F. Howard and Esau Bennett; that said persons pretended to be such trustees by virtue of an election held on the first Monday in May, 1868, but that the inspectors of said election never made a certified statement, over their own signatures, of the persons elected to fill the several offices in said town, nor did they file such certificate of election of any of the persons so acting as such board of trustees, and those persons had no right whatever to act upon any report or petition in relation to the issuing of said bonds, or have anything whatever to do with the issuing of the same; that such pretended bonds and coupons were issued without any petition by the school trustees of said town, and without any ordinance of the board of trustees of the town authorizing the same; that at the time of the issuing of such pretended bonds, and of the sale thereof, the purpose for which they were issued and sold was to raise money to build a school-house, not within the corporate limits of the town; that there was no consideration whatever for the issuing of said bonds; that it was stated and recited in each of the bonds that they were issued and authorized under an act of the Legislature of the State of Indiana, approved March 11th, 1867, and of an ordinance passed by the board of trustees of said town on the 29th day of January, 1869; that, long prior to

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the time when any of said bonds were issued, the act under which they were issued was repealed; that none of said bonds were issued prior to May 22d, 1869; that the acts of the pretended board of trustees of said town, in issuing such pretended bonds, were *ultra vires*; that the pretended bonds were issued under and by virtue of a law that had been amended and repealed long before any of the bonds were issued, which fact appears on the face thereof; and that said pretended bonds, for the reasons stated, were illegal and void. Wherefore the appellants prayed that the said bonds might be declared illegal and void, and be cancelled by the order and judgment of the court, and that they recover their costs.

Appellants' counsel claim that the demurrer to this paragraph of answer should have been overruled thereto and sustained to the complaint, "for the reason that the complaint is bad." On this point counsel say: "The complaint is defective, for the reason that it nowhere appears therein how the appellees became the owners of the bonds referred to and made part of the complaint. If they purchased them from the town, it should so appear; if they are endorsees, that should so appear in their complaint. If they are the notes of the corporation the complaint should allege to whom issued; if not to them how did they become the owners? And for a further reason that it is not alleged that the appellees have sued on the bonds or coupons, and procured a judgment against the town thereon. If the appellees had, at the time this suit was instituted, a legal remedy, they can not sustain this action."

Neither of these objections to the sufficiency of the complaint seems to us to be well taken. The bonds described in the complaint were each payable to bearer, and the appellees alleged, as we have seen, that they were severally the owners and holders of certain of such bonds. This was sufficient. Bonds or notes, payable to bearer, are negotiable by delivery merely, and, as against the obligor or maker, it is immaterial, as a question of pleading, how the holders became the owners thereof, or whether they purchased them from the obligor or

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maker or from some third person. *Black v. Duncan*, 60 Ind. 522. As a general rule, it is true that a proceeding by mandate will not be sustained when it appears that the plaintiff has an adequate legal remedy. *Louisville, etc., R. R. Co. v. State, ex rel.*, 25 Ind. 177; *State, ex rel., v. Board, etc.*, 45 Ind. 501. This is the common-law rule, but it has been modified by statute, to some extent, in this State. In section 739 of the civil code of 1852 (sec. 1168, R. S. 1881), it is provided as follows:

“Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station.” 2 R. S. 1876, p. 296.

In this case, it does not appear that a suit on the bonds or coupons, or the recovery of a judgment thereon, would have been of any advantage whatever to the appellees. On the contrary, we think, it does appear that their only adequate remedy, in the case stated in their complaint, was a proceeding by mandate against the town and school town of Monticello, and the proper officers of those corporations, to compel the levy and collection of taxes necessary and sufficient to pay off and satisfy their outstanding bonds and coupons. *Huntington v. Smith*, 25 Ind. 486; *Mayor, etc., v. State, ex rel.*, 57 Ind. 152. Under section 4490, R. S. 1881, in force March 11th, 1875, the appellants, the trustees of the town of Monticello, were “authorized and required to levy, annually, a special additional tax, * * * * sufficient to pay the interest and principal of said bonds falling due.” It was alleged in the complaint, that the trustees of the town “failed, neglected and refused” to discharge the plain statutory duties thus required of them, by levying and collecting such “special additional tax.” The appellees’ suit, therefore, is expressly authorized by statute; and their complaint stated facts sufficient to constitute a cause of action.

The appellants’ counsel next inquire, “Are the answers good? They are substantially the same,” they say; but they

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“call particular attention” to the “seventh paragraph of answer,” of which we have already given a full summary in this opinion. Counsel earnestly insist that it is shown by the facts alleged in the appellants’ answers, that the trustees of the town of Monticello, in the issue of the bonds described in appellees’ complaint, did not comply with the requirements of the act of March 11th, 1867, under and pursuant to the provisions of which act the bonds purported on their face to have been authorized and issued; and that none of the bonds were issued and negotiated until after the act of March 11th, 1867, had been amended and superseded by a later act, which took effect on May 15th, 1869. It must be confessed, we think, that the allegations of the answers, conceded to be true by the demurrers thereto, show a failure to comply very strictly with the provisions of the statute on the part of the trustees of the school town of Monticello. But it is shown that the bonds in controversy were issued and negotiated pursuant to the acts of March 11th, 1867, and of May 15th, 1869, by the trustees of the town of Monticello. To such a case, the provisions of section 4 of the act of March 8th, 1873, entitled “An act to authorize cities and towns to negotiate and sell bonds to procure means with which to erect and complete unfinished school buildings, and to purchase any ground and building for school purposes, and to pay debts contracted for such erection and completion, and purchase of buildings and grounds, and authorizing the levy and collection of an additional special school tax for the payment of such bonds,” seem to us to be expressly applicable. Section 4 reads as follows:

“All bonds issued, contracts made, and debts created pursuant to the acts of March 11th, 1867, and May 15th, 1869, relating to the same subject as this act, are hereby legalized and declared valid, and the taxes to pay any such bonds, contracts or debts, and the interest thereon, shall be assessed and collected in accordance with this act.” Acts 1873, p. 60, *et seq.*; 1 R. S. 1876, p. 345.

Appellants’ counsel claim that this section of the statute is

unconstitutional and void, because, they say, the subject of the section is not expressed in the title of the act, nor is it matter properly connected therewith. We do not think the section in question is open to this objection, or repugnant to any provision of the constitution. *Kane v. State, ex rel.*, 78 Ind. 103; *Farrar v. Clark*, 85 Ind. 449; *Warren v. Britton*, 84 Ind. 14.

But "the appellants insist that if this section is held valid it can not apply to such a case as is made by their answers," because it was alleged therein, "that the bonds were issued by the town trustees to raise money to build a school-house, not within the corporate limits of the town." They say: "The acts of March 11th, 1867, and May 15th, 1869, gave them no such powers. If they had no such powers, the bonds could not have been issued pursuant to the acts of 1867 and 1869." The acts in question authorized the town trustees to purchase "any ground" and erect a building or buildings thereon, without specific reference to the corporate limits of the town. As a rule we do not doubt the propriety of the purchase by town trustees, for school purposes, of real estate within the corporate limits of the town; for, under the school laws of this State, the territory of the township, outside of the limits of the incorporated town, constitutes another and different school corporation. *State, ex rel., v. Shields*, 56 Ind. 521. But we are not prepared to say that the bonds of an incorporated town, negotiated and sold to procure means with which to build a school-house, are *ultra vires* and void, merely because such school-house is not within the corporate limits of such town. It has been held by this court that the school township may own and hold a school-house and lot, within the corporate limits of a school town or city; and, in the absence of any statutory prohibition, we know of no good reason why it should not be held that the school town or city may purchase grounds and erect school buildings thereon, adjacent to, but outside of, its corporate limits. *Heizer v. Yohn*, 37 Ind. 415; *Reckert v. City of Peru*, 60 Ind. 473; *Kent v. Town of Kentland*, 62 Ind. 291.

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Appellants' counsel also claim that the acts of the town trustees who authorized and issued the appellees' bonds were absolutely void for the reason, as they said, that the inspectors of the town election had failed to make a certified statement, over their own signatures, of the persons elected as the officers of the town, and file the same with the clerk of the circuit court of the county, as by law required. But the legalizing act of March 13th, 1875, was broad enough in its scope and terms, we think, to legalize and validate the acts of the trustees of the town of Monticello and the bonds issued by their authority and held by the appellees. In section 1 of this act it was expressly provided: "That the failure of the inspector of any election held in any incorporated town in this State, to make out a certified statement of the persons elected to fill the several offices in said town, over their [his?] own signature, and file the same with the clerk of the circuit court of the proper county, within the time required by law, shall not invalidate any of the acts of any officer or officers elected at such election, and all and every of their acts shall be taken and considered as valid as if said certified statement had been filed with the said clerk within the time prescribed by law," etc. Acts 1875, Spec. Sess., p. 74. Before the enactment of this legalizing and curative statute, this court held, with much apparent reluctance, that the acts and ordinances of a board of town trustees, before the proper certified statement of their election had been made out and filed, were invalid and void. *Dinwiddie v. President, etc.*, 37 Ind. 66; *Pratt v. Luther*, 45 Ind. 250. But it was competent for the General Assembly, as the supreme and sovereign power of the State, to legalize and validate the acts and ordinances of the trustees *de facto* of the town of Monticello, and this was done, we think, by the aforesaid act of March 13th, 1875.

Upon this subject, in Cooley's Constitutional Limitations, 371, it is said: "The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in

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the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." This rule has often been recognized and acted upon by this court, in construing and determining the constitutionality and validity of legalizing or curative statutes. *Walpole v. Elliott*, 18 Ind. 258—where it was said that "Curative statutes are but a species of retrospective legislation; and retrospective legislation is valid where not forbidden by the Constitution." *Price v. Huey*, 22 Ind. 18; *Halstead v. Board, etc., of Lake Co.*, 56 Ind. 363; *Millikin v. Town of Bloomington*, 49 Ind. 62. We do not doubt the constitutionality and validity of the curative statute under consideration, in the case at bar.

Finally, it is insisted by the appellants' counsel, as ground for the reversal of the judgment below, that the trial court erred in overruling the demurrer of the appellant William R. Harvey, treasurer of the town of Monticello, to the second paragraph of appellees' reply to the separate answer of the treasurer, Harvey. In his separate answer, the treasurer, Harvey, alleged in substance, that, on May 4th, 1880, he was duly qualified, and took upon himself the duties of treasurer of said town, and had since been acting as such treasurer; that, as such treasurer, he received from his predecessor in office about \$2,000, of which sum about \$1,700, he was informed, was special school fund of said town, and that he had since received from the town marshal \$41.08 of said fund, making in all the sum of \$1,741.08; that, prior to the issue of the alternative mandate herein, he had made a full report of the amount of moneys received, the amount disbursed by him, and the amount remaining delinquent, to the trustees of said town; that the moneys collected could be paid

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out only by authority of the town trustees, and they had never authorized him to pay out such moneys; that, on May 20th, 1878, the town of Monticello issued its bonds in the sum of \$21,000, for the purpose of funding its debt, that is, the pretended debt evidenced by the pretended bonds held by the appellees; that those bonds were then in the hands of divers parties, whose names were unknown to the appellant, Harvey; that the interest, then due on said bonds, amounted to about \$2,000; that the holders of such bonds were then demanding of him that he apply the moneys then in his hands in payment of the interest due on the bonds held by them; that the pretended bonds held by appellees, mentioned in their complaint in this suit, were void for the following reasons: That, on January 29th, 1869, a paper was presented to the persons then assuming to be the board of trustees of the town of Monticello, a copy of which was therewith filed, and that no other petition was at any time presented in relation to that subject; that, on the same day, the board of trustees passed an ordinance, a copy of which was therewith filed, and that no other ordinance was passed by said board in relation to the issuing of such bonds; that no other authority was ever given or granted by such board of trustees, authorizing the issuing of such bonds; that the persons assuming to act as such board of trustees, at that time, were certain named persons; that such persons pretended to be such trustees, by virtue of an election on the first Monday of May, 1868, but that the inspectors of such election never made a certified statement, over their own signatures, of the persons elected to fill the several offices in said town, nor did they file the same with the clerk of the circuit court of White county, within ten days after such election, nor had they ever made or filed such certificate of election of any of the persons named as acting as such board of trustees, and they had no right whatever to act as such board, and no other board ever did act, or attempt to act, upon any report or petition in relation to the issuing of such bonds; that the pretended bonds

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and coupons, in the complaint mentioned, were issued without any ordinance of any board of trustees authorizing the same; that, at the time of the issue and sale of such pretended bonds, the purpose of such issue and sale was to raise money to build a school-house not within the corporate limits of the town of Monticello; that there was no consideration whatever for the issue of such bonds; that it was recited in each of the bonds that they were authorized and issued under the act of the Legislature of this State, of March 11th, 1867; that long prior to the issue of any of such bonds, the aforesaid act was repealed; that the acts of such board of trustees, in the issue of such pretended bonds, were *ultra vires*; and that each and all of such pretended bonds were illegal and void. Wherefore, etc.

It will be seen from the foregoing summary of his answer, that the appellant Harvey, as town treasurer, stated substantially the same matters as his defence to appellees' action as were pleaded by the town trustees and town in the seventh paragraph of their answer. These matters we have already considered, and have reached the conclusion that they constituted no sufficient defence for the town or its trustees. Nor did they, we think, constitute any valid defence for the appellant Harvey, as treasurer of the town. As we have seen, the election of the town officers of the town of Monticello, and the bonds issued by such town, were subsequently legalized and validated. The only allegation in the answer of Harvey, treasurer, not heretofore considered, was the allegation that the moneys collected and in his hands for the payment of such bonds and coupons, could only be paid out by him, as treasurer, by authority of the town trustees, and they had never authorized him to pay out such moneys. It is very certain, we think, that these facts were not sufficient to constitute a bar to the appellees' action. On the contrary, the facts alleged, conceding their truth, seem to us to afford additional reasons for the issue of a mandate as prayed for in appellees' complaint;

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for the answer admitted that the respondent Harvey, as treasurer of the town, had funds in his hands applicable to the payment of the bonds and coupons; but it was claimed that the town trustees had never authorized the application of such funds to such payment, and that he, as such treasurer, could not make the application without such authority. To this claim of the treasurer the appellees replied in the second paragraph of their reply, setting out the ordinance of the town under which the bonds were issued, wherein it was provided that "the interest upon said bonds is to be paid by the treasurer of said corporation, at his office in said incorporated town." The treasurer needed no other warrant or authority than this ordinance, we think, for the application of the funds in his hands to the payment of the interest on the bonds. It follows, therefore, that the second paragraph of the reply was sufficient.

So, we may say, also, in regard to the separate answer of the appellant Harvey, as town marshal of Monticello. Appellants' counsel admit that "the facts alleged therein are substantially the same as in the answer of the trustees of the town and the town." Those facts we have already fully considered, and have reached the conclusion, that, under the law applicable thereto, they constitute no valid or sufficient bar or defence to appellees' action.

From a careful examination of the record of this cause, and upon due consideration of the able and exhaustive briefs of counsel, we are of the opinion that there is no error or defect in the pleadings or proceedings which can be said to "affect the substantial rights" of the appellants. In such a case, the code requires the affirmance of the judgment below. Code of 1852, section 101; sections 398 and 658, R. S. 1881.

The judgment is affirmed, with costs.

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No. 10,134.

PURCELL v. ENGLISH.

PRACTICE.—*Right of Court to Instruct Jury Where There is no Evidence.*—The trial court may withdraw a case from the jury when there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them.

SAME.—*Instructions, Where Negligence is the Issue.*—Where there is no dispute as to the facts, and the question of negligence becomes one of law, the court may withdraw the case from the jury.

SAME.—*Rule Where Court Directs Verdict.*—The rule in cases where the court instructs a jury to return a verdict is substantially the same as in cases of demurrer to evidence.

SAME.—Recovery must be on the cause of action declared on; a plaintiff can not declare on one cause of action and recover on another.

LANDLORD AND TENANT.—*Negligence.—Personal Injury to Tenant.*—Where a stairway, connected with apartments hired in a tenement house occupied by several tenants, is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable for damages to a tenant injured thereby, who uses such stairway with knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use.

SAME.—*Nudum Pactum.—Repairs.*—A promise to repair made after the lease is entered into is a mere *nudum pactum*, and the landlord is not liable for injuries resulting from a failure to make such repairs.

From the Superior Court of Marion County.

E. C. Buskirk and P. W. Bartholomew, for appellant.

J. R. Wilson and J. L. Wilson, for appellee.

ELLIOTT, J.—The case made by the appellant's complaint, shortly stated, is this: She was the tenant of the appellee, having leased rooms in an upper story of a building owned by him; the approach to these rooms was by a stairway common to the use of all the tenants of the building; the railing of this stairway had been suffered to get out of repair, and was rotten and loose; the stairway became dangerous and unsafe from ice and snow, which covered the steps; the appellant, in attempting to descend, slipped, and, in falling, grasped the railing, which gave way, and she fell to the pavement and was seriously hurt. It will be observed that the complaint

86	34
127	94
127	418
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132	482
86	34
136	383
86	34
137	210
86	34
155	177
86	34
164	425

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does not allege that the landlord had contracted to repair, but proceeds entirely on the theory that the duty rested upon him independently of contract.

The court, upon the close of the appellant's evidence, directed the jury to return a verdict for the defendant.

The court may, there is no doubt, direct the jury to return a verdict in favor of the defendant, in a proper case. *Washer v. Allensville, etc., T. P. Co.*, 81 Ind. 78; *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135); *Hazzard v. Citizens State Bank*, 72 Ind. 130; *Dodge v. Gaylord*, 53 Ind. 365; *Pleasants v. Fant*, 22 Wal. 116.

When the cause of action declared on is negligence, the court may direct a verdict for the defendant, in cases where the evidence wholly fails to make out a *prima facie* case. It is true that the question of negligence is generally one of mingled law and fact, but there are cases where the question is purely one of law. *Binford v. Johnston*, 82 Ind. 426. Where there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them, the question is one of law, and the court may rightfully take the case from the jury. 2 Thompson Neg. 1236, 1237; Thomp. Charging the Jury, 23; *Toomey v. London, etc., R. W. Co.*, 3 C. B. (N. S.) 146.

The right of the court to withdraw the case from the jury unquestionably exists in cases where negligence is the issue, as well as in other cases; but, whatever may be the character of the issue, the case can not be taken from the jury if there are any facts proved from which the jury would, by fair and reasonable inference, be authorized to find for the plaintiff. All reasonable inferences, not, however, forced and violent ones, are to be indulged in favor of the plaintiff in such a case, for the rule is substantially the same as that which obtains in cases where there is a demurrer to the evidence. *Hazzard v. Citizens State Bank*, 72 Ind. 130; *Steinmetz v. Wingate*, 42 Ind. 574; *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300; *Fritz v. Clark*, 80 Ind. 591.

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If the evidence given upon the trial of the cause can, by fair intendment or reasonable inference be deemed to make out the cause of action declared on, then the appellant is entitled to a reversal.

It is not sufficient, even upon a demurrer to the evidence, that the plaintiff make out some cause of action, but it is incumbent upon him to make out the cause of action set forth in his complaint. He can not declare on one cause of action and recover upon another. There is in this complaint no allegation that the appellee had agreed to keep the demised premises in repair, and, even if a contract had been proved, it is doubtful whether the appellant could have been allowed to succeed on the theory that there was a contract. But, waiving this point and going to the evidence, we are clear that no contract was proved. The utmost that can be claimed is that the evidence tends to show a voluntary promise, made after the contract for the letting of the premises had been entered into. This evidence did not establish, nor tend to establish, a contract on the part of the landlord to repair, for it did no more than show a mere gratuitous promise, creating no binding obligation. The rule upon this subject is thus stated in a recent work: "A promise to repair, made after the lease is entered into, is a mere *nudum pactum*, and no liability exists for a failure on his" (the landlord's) "part to make such repairs." Wood Land. & Tenant, sec. 382. *Libbey v. Tolford*, 48 Me. 316; *Gill v. Middleton*, 105 Mass. 477; S. C., 7 Am. R. 548; *Doupe v. Gennin*, 37 How. Pr. 5; S. C., 45 N. Y. 119. The case is, therefore, to be treated as one in which there is no contract on the part of the landlord to repair.

Where there is no duty there can be no actionable negligence. Cooley Torts, 659; 1 Addison Torts, sec. 28; Wharton Neg., sec. 3. In cases of the class to which the present belongs, three of the essential things which the plaintiff is required to establish are, the existence of a duty, that it is owing to him, and that it has not been performed. The material part of the appellant's case could not be made out without

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showing a duty owing to her from her landlord to keep the demised premises in repair.

The duty of the landlord to repair does not arise out of the relation of landlord and tenant; on the contrary, the relation devolves that duty upon the tenant. It is only where the landlord contracts to maintain the premises in repair that he is burdened with that duty. The logical conclusion from this principle, and a more firmly settled one there is not in all the books, is, that a landlord, not under contract to repair, is not, as a general rule, responsible to the tenant for injuries caused by a defective condition of the demised premises.

In a carefully written article in the American Law Review the authorities are reviewed and the rule deduced that there is no warranty, express or implied, as to the condition of demised premises, and that the tenant must determine for himself the safety and fitness of the premises for use and occupancy. 6 Am. Law Rev. 614; Taylor Land. & Ten. (6th ed.) sec. 381. This is the rule adopted by our own cases. *Estep v. Estep*, 23 Ind. 114, *vide* authorities cited, p. 116. Ordinarily, therefore, a tenant who leases property takes upon himself all risks except, perhaps, as against latent defects not discoverable by the use of ordinary diligence, and can not recover damages from his landlord because of an omission to make the premises habitable or safe.

Whether a tenant would have a right to abandon the premises if the means of access to them had become unsafe and dangerous, is not here the question. The question here is, whether the tenant, continuing in possession and making use of the premises, can recover damages for personal injuries caused by the unsafe condition of the means of ingress and egress. There are cases, we may remark in passing, holding that even where the landlord covenants to make repairs and fails to do so, the tenant must, where the expense is not great, make them and charge them against the landlord. *Cook v. Soule*, 56 N. Y. 420; *Loker v. Damon*, 17 Pick. 284; *Miller*

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v. *Mariner's Church*, 7 Maine, 51 (20 Am. Dec. 341); *Benkard v. Babcock*, 2 Rob. (N. Y.) 175.

The duty of the tenant to keep in safe condition for his own use the demised premises extends to all the appurtenances connected therewith, and this includes steps, stairways and other approaches. Whatever passes to the tenant under the lease is, for the term designated, under his control and in his possession. *Pomfret v. Ricroft*, 1 Saunders (6th ed.), 321; Wood Land. & Ten., sections 216, auth. n., 371, auth. n. If he neglects to make repairs, and suffers the premises to become unsafe, it is clear that, in ordinary cases at least, no action will lie against the landlord for injuries suffered by the tenant and caused by the unsafe condition of the premises arising from the neglect to repair.

It is obvious from this statement of fundamental principles that in cases of an ordinary tenancy the tenant can not maintain an action against the landlord for injuries caused by the neglect to repair the demised premises unless the landlord has expressly covenanted to repair. If the appellant can maintain this action, it must be because her case possesses some elements which carry it out of the general rule.

The only element in this case which can with any plausibility be said to distinguish it from ordinary cases of tenancy is, that the landlord hired out apartments to separate tenants, and that the stairway was the common passage for the use of all. It is difficult to perceive how this fact can exert a controlling influence upon the question of the landlord's liability, for whether the premises are demised to one or to many tenants, the principle upon which rests the landlord's immunity from the burden of repairing is not changed. Nor does it change the effect of the contract by which the premises are demised. As said by a writer already referred to: "For a tenant is at once a bailee and a purchaser. He is a bailee because, his ownership being determinable and not absolute, yet being exclusive while it lasts, he is, by the mere fact of demise, and in the absence of special undertakings to that

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effect, charged with a trust to restore the property in substantially the same condition as when he took it." 6 Am. L. Review, 614. It would seem clear on principle, that the landlord's duty is the same whether he demises to one or to many tenants, so far as concerns his liability to a tenant for personal injuries caused by a failure to repair.

In *Humphrey v. Wait*, 22 Up. Can. C. P. 580, the plaintiff had hired apartments of the defendant in a building occupied in part by other tenants, and sustained injuries by stepping through a hole in the floor of a common passage way leading to the apartments, and it was held that an action could not be maintained against the landlord, and a nonsuit was directed. In the course of the opinion delivered in that case HAGARTY, C. J., said: "It would be a singular state of the law, if the landlord would not be answerable if he demised the stairway with the upper story, and would be answerable if he only gave a right to use it, as an approach to the part of the house actually demised." In *Gott v. Gandy*, 2 E. & Bl. 845, Lord CAMPBELL said: "Now let us see what are the facts alleged. They are these: the defendant was landlord of premises which were let to the plaintiffs from year to year; during the tenancy the premises were in a dangerous state for want of substantial repairs; the defendant had notice from the plaintiffs, and was requested to repair them, and did not do so. * * There is no allegation of any contract to do substantial repairs. It lies therefore on the counsel of the plaintiffs, who are actors, to establish, on authority or on principle, that this obligation results from the relation of landlord and tenant. Mr. Russell can produce no authority in his favor, not even a dictum. And I have heard no legal principle from which it would follow that the landlord was bound to repair the premises." In *Carstairs v. Taylor*, L. R., 6 Exch. 216, the doctrine was carried to the extent of holding that there is no liability on the part of the landlord who himself occupied a part of the premises, unless it is shown that he was negligent with respect to the particular act which caused the injury.

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The English cases agree in holding that for injuries for a failure to repair no action will lie by the tenant against the landlord. 1 Addison Torts, sec. 240; Smith Land. & Ten. 206; *Robbins v. Jones*, 15 C. B. N. S. 221; *Payne v. Rogers*, 2 H. Bl. 350.

Turning to the American authorities we find in one of our books this statement of the rule, whether too broad or not we need not stop to enquire: "The liability of the landlord, however, exists only in favor of persons who stand strictly upon their rights as strangers." Shearman & Redf. Neg., sec. 503. Another author says: "An owner being out of possession and not bound to repair, is not liable in this action" (i. e. for nuisance), "for injuries received in consequence of his neglect to repair." Whart. Neg., sec. 817. In still another work it is said, in speaking of the landlord's liability: "Nor, in the absence of a covenant to repair, is he liable for injury resulting from the faulty construction or condition of the premises, the control over which is in the hands of a tenant, either to the tenant or third persons." Wood Land. & Ten., sec. 384; 1 Thompson Neg. 323. In *Corey v. Mann*, 14 How. Pr. 163, the action was for injuries received from falling down a stairway forming a common passage way, by one tenant occupying part of premises also occupied by other tenants of the same landlord; and it was held that no action could be maintained. The same general principle is declared in the cases of *Howard v. Doolittle*, 3 Duer, 464, and *Robbins v. Mount*, 33 How. Pr. 24. In *Kaiser v. Hirth*, 46 How. Pr. 161, it was held that an owner who occupied a part of the house was not liable for an injury to a visitor to one of his tenants unless it was shown that his, the landlord's, negligence was the cause of the injury, and that the fact that he occupied a part of the premises created no presumption against him. A like doctrine is declared in *Moore v. Goedel*, 34 N. Y. 527. The Supreme Court of California held, in the case of *Loupe v. Wood*, 51 Cal. 586, that there was no liability on the part of the landlord arising from the defective condition of the walls of a cellar.

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We have examined the cases cited by the appellant, and do not find any of them in point. The cases in the Georgia reports are not in point, because they are founded upon an express statute making it the duty of the landlord to repair. The cases of *Godley v. Hagerty*, 20 Pa. St. 387, and *House v. Metcalf*, 27 Conn. 631, were actions by a stranger, and are, therefore, not in point. *Fisher v. Thirkell*, 21 Mich. 1 (S. C., 4 Am. R. 422), is against rather than in favor of the appellant. In that case the landlord was held not to be liable to one who suffered an injury by falling through a scuttle in a sidewalk adjoining premises in the possession of a tenant. The other case cited, that of *Shindelbeck v. Moon*, 32 Ohio St. 264 (S. C., 30 Am. R. 584), is also against the doctrine maintained by counsel. In that case the injury was occasioned by the accumulation of ice upon steps leading into a store-room owned by the defendant, but occupied by a tenant, and the holding was that the landlord was not liable for injuries sustained by a stranger. In closing the opinion it was said: "And, again, it was the ice that occasioned the accident. It is not averred that it was the duty of the landlord to remove this ice, nor does it appear that he had such control of the premises as called upon him to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things, such as the tenant was called upon to remedy, and not the landlord, as between landlord and tenant." We have in our investigation found one case which lends support to the general doctrine for which appellant's counsel contend. The case to which we refer is that of *Looney v. McLean*, 129 Mass. 33 (S. C., 37 Am. R. 295). In that case the wife of the tenant of a part of a tenement house occupied by several families was injured by the giving way of one of the steps of a stairway leading to the roof of a shed used in common by the tenants for the purpose of drying clothes; and it was held that an action would lie

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against the landlord. The question is not discussed, and only cases from Massachusetts are cited, and they do not decide the point; on the contrary, such of them as apply to the relation of landlord and tenant recognize the rule that the landlord is not liable to the tenant for a failure to repair; two of them do not touch upon the subject of a landlord's liability; one of the two is upon the question of the liability of a railroad company which constructs a passage way across a public street, and the other is upon the same general question. But, conceding the soundness of the ruling in that case, it does not apply to the case at bar, for here the cause of the injury was not the defective construction of the stairway, or its unsafe condition at the time the premises were leased. The stairway here is directly connected with the part of the premises leased to the appellant; in the Massachusetts case it was otherwise. Here the thing which made the stairway unsafe was the temporary covering of snow and ice; while in the Massachusetts case the unsafe condition was permanent, and had long existed.

It is not necessary for us in the present case to lay down any general rule upon the subject of a landlord's liability to a tenant occupying apartments in a tenement house occupied by other tenants. It is sufficient for us to ascertain and state a rule governing cases such as that made by the evidence before us. We are satisfied that the authorities warrant us in adjudging that, where a stairway connected with apartments hired in a tenement house occupied by several tenants is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable to the tenant who uses such a stairway with full knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use. Any other rule would entail upon landlords a grievous and unjust burden, cast upon them a duty which long-settled rules have imposed upon the tenants, and result in imperiling the interests of an owner out of possession and relieve those in possession of his property from that care which the law imposes upon

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bailees and others occupying analogous positions. If any other rule is adopted, then the owner is charged with the duty of watching steps leading to every part of the premises, and of keeping them free from all temporary obstructions; for, let it once be granted that the landlord is liable for obstructions or defects not permanent and not growing out of the character of the structure, it will be impossible to draw any line, and he must be held accountable for all obstructions and defects, no matter how transient their character. Whether a landlord hiring apartments to many tenants is liable for latent defects, or for faults in the construction, or for permanent defects in the common passage ways, we do not decide.

The evidence before us shows that the ice and snow made the stairway unsafe, and caused the accident. But for the ice and snow, which the tenant could have removed with very little labor, or at a trifling expense, the appellant could have used the stairway in perfect safety. We are satisfied that the court below was right in holding that the cause of the accident was the accumulation of ice and snow upon the stairway, and that, for an injury resulting from such a cause, a landlord who had made no covenant to repair is not liable.

Judgment affirmed.

No. 9545.

HOPPER ET AL. v. LUCAS.

JUDGMENT.—*Action on.*—*Complaint.*—*Exhibit.*—A copy of the judgment sued on is not a proper part of a complaint on such judgment.
SAME.—*Justice of the Peace.*—A complaint upon the judgment of a justice of the peace must allege that it was duly given or made, or contain equivalent allegations.
SAME.—*Transcript.*—*Evidence.*—On the trial of an action upon a judgment of a justice of the peace, a transcript thereof concluding: "It is therefore adjudged by me that the plaintiff recover of the defendants Miller and

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138	247
86	43
141	344
86	43
146	159
86	43
150	230
86	43
166	654
167	466

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Cox the sum of 133.95, with costs taxed at 1.00. Given under my hand," etc., is not inadmissible in evidence because the names of the parties do not fully appear, nor because the cause of action is not copied in full, nor because the amount of the judgment is not written out in words, but is fatally defective in not showing with certainty, in dollars and cents, the amount of the recovery adjudged.

SAME.—Original Papers.—In such case the original papers constituting the cause of action may be given in evidence to explain the meaning of the abstract numerals.

SAME.—Confession.—Replevin Bail.—As between the parties to the suit and the replevin bail, no affidavit is necessary to authorize the entry of a judgment by confession.

SAME.—Partner.—A partner may not confess a judgment against the firm of which he is a member, but a judgment so confessed will be void as to them and valid as to him.

SAME.—Replevin Bail.—By his entry of bail a replevin bail releases errors and waives any right to question the existence of the judgment which he has thereby expressly recognized.

From the Montgomery Circuit Court.

G. W. Paul and *J. E. Humphries*, for appellants.

P. S. Kennedy, *W. T. Brush* and *S. C. Kennedy*, for appellee.

ZOLLARS, J.—This action was brought in the court below by appellee against appellants. Appellants each filed a demurrer to the complaint, and each made a motion for a new trial. The demurrers and motions were overruled; appellants excepted, and have assigned these rulings for error in this court.

The complaint states, substantially, that on the 26th day of April, 1879, the appellee, in and by the name of T. N. Lucas, recovered a judgment against appellant Miller, before a justice of the peace in and for the township of Franklin, in Montgomery county, which judgment was duly entered of record in the docket of said justice, with the name of the justice subscribed thereto; that on said day, and after the judgment was so rendered, entered and signed, appellant Hopper became replevin bail for the stay of execution, and that the said judgment is due and unpaid. There was an attempt to make a transcript of the said judgment a part of the complaint, by filing the same with it as an exhibit.

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It was held in some of the earlier cases in this court that when a judgment is sued upon, or set up as a defence, a transcript of the same must be filed with the pleading, and thus be made a part of it, under the statute which requires that when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading.

It is now settled, by later and well considered cases, that a judgment is not a written instrument within the meaning of the statute, and that a transcript of the same need not be filed with pleadings in such cases. *Lytle v. Lytle*, 37 Ind. 281; *Hinkle v. Reid*, 43 Ind. 390; *Wyant v. Wyant*, 38 Ind. 48; *Davenport v. Barnett*, 51 Ind. 329; *Mull v. McKnight*, 67 Ind. 525. As the statute does not require it, the transcript of the judgment filed as an exhibit in this case is not, and can not be made, a part of the complaint by such filing. The sufficiency of the complaint must be determined without reference to it. *Wilson v. Vance*, 55 Ind. 584; *Richardson v. Jones*, 58 Ind. 240; *Morrison v. Fishel*, 64 Ind. 177; *Wharton v. Wilson*, 60 Ind. 591.

We are cited by counsel for appellee to the case of *Stewart v. Armel*, 62 Ind. 593. We do not understand that case to be in conflict with the above. It is apparent from a reading of the case that the question as to whether or not the transcript of the judgment, filed with the complaint, became a part of it, was not made material by the discussion of counsel.

The above cases are not in any way referred to. It was evidently not the intention of the court to overrule them, or to announce any rule or proposition in conflict with them.

Without reference to the transcript of the judgment filed with the complaint in this case, does the complaint state a cause of action against appellants, or either of them?

There are no averments in the complaint showing, or attempting to show, that the justice's court had jurisdiction to render the judgment upon which this action is based. The only allegation is, that on the 26th day of April, 1879, appellee recovered a judgment against Miller before a justice of

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the peace in Franklin township, Montgomery county. There is no allegation that a summons was issued or served, or that Miller appeared, or confessed judgment, or that he was a resident of the township in which the action was brought; nor is there any averment that the judgment was duly rendered. There is an averment that the judgment was duly entered of record in the docket of the justice, with the name of the justice subscribed thereto; but this does not amount to an averment that the judgment was duly rendered.

There is a very material difference between the rendition and the recording of a judgment. The one is judicial, the other ministerial. Without an averment showing that the justice's court in some way acquired jurisdiction over Miller, and that he was a resident of the township in which the action was brought, or that the case comes within some of the exceptions of the statute, or that the judgment was duly rendered, the complaint is not good, and the demurrers thereto should have been sustained. Justices' courts are courts of special and limited jurisdiction. When it is made to appear that they have acquired jurisdiction, the same presumptions are indulged in favor of their proceedings as in case of courts of general jurisdiction. But presumptions will not be indulged that they have acquired jurisdiction. This must be made to appear by proper averments in the complaint, when an action is based on a judgment of such courts. The question involved here has been settled in this State, by a recent decision of this court, in the case of *Wilkinson v. Moore*, 79 Ind. 397. See, also, *Mills v. Martin*, 19 Johns. 7; *Jolley v. Foltz*, 34 Cal. 321; 4 Wait's Actions and Defenses, p. 193; Freeman Judgments, sec. 454.

In the case of *Mills v. Martin*, *supra*, the court says: "There is, however, a marked and decided distinction between superior courts of general jurisdiction, and inferior courts, or courts of special and limited jurisdiction. In the former case, the intendment of the law is, that they had jurisdiction, until the contrary appears; but with regard to inferior courts, or those of special and limited jurisdiction, those who claim any right

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or exemption under their proceedings, are bound to show, affirmatively, that they had jurisdiction."

In the case of *Jolley v. Foltz*, *supra*, the court held that it must be shown affirmatively by the party relying upon or claiming any right under the judgment, that the justice had jurisdiction. The residence of the defendant is a jurisdictional fact in a justice's court. When it nowhere appears in the docket or other papers in an action determined in a justice's court, that the defendant resided in the township in which the action was commenced, or that he was within any of the exceptions enumerated, the judgment is not sufficient evidence in an action upon the same. We cite further 2 R. S. 1876, p. 607, sec. 13; R. S. 1881, sec. 1441; *Jolly v. Ghering*, 40 Ind. 139; *Featherston v. Small*, 77 Ind. 143; *Argo v. Barthand*, 80 Ind. 63.

In this State the necessity of stating jurisdictional facts, specifically, is dispensed with by statute, which provides as follows: "In pleading a judgment or decision of a court or officer of special jurisdiction, it shall be sufficient to allege, generally, that the judgment or decision was duly given or made. If the allegation be denied, the facts conferring jurisdiction must be proved on the trial." R. S. 1881, sec. 369; 2 R. S. 1876, p. 76, sec. 83.

If, in this case, the complaint contained an allegation, that the judgment was duly given or made, it would be a sufficient complaint.

On the trial below, appellee, over the objections and exceptions of appellants, introduced in evidence a certified transcript of what purports to be a judgment—the one referred to in the complaint—and rested his case. In their motions for a new trial, appellants urged that the court erred in admitting this transcript in evidence, and that the decision of the court, based upon it, is not sustained by sufficient evidence. When the transcript of the judgment was offered in evidence, appellants made a number of objections to its sufficiency, and the sufficiency of the judgment evidenced thereby, based their

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motions for a new trial mainly upon the objections so made, and urge them in their brief in this court as a cause for reversal. It is claimed that the proceedings before the justice, including the rendition of the judgment, the entry and approval of the replevin bail, were not in accordance with the statute, and that the whole is, therefore, void.

The statute referred to is as follows: "Every justice shall, in a substantial bound book of not less than two hundred pages, keep a docket, in which he shall record the proceedings, in full, of all suits instituted before him; which record shall contain the names of the parties at full length, a copy of the cause of action, and of the set-off of the defendant, if any, and all proceedings had therein, and the amount of the judgment written out in words; and every such record of each cause shall, when completed, be signed by such justice, and the cause noted in a proper index to be contained in such docket." 2 R. S. 1876, p. 608, sec. 18; R. S. 1881, sec. 1437.

The title of the cause in the justice's court, as appears from the transcript, is as follows:

"T. N. LUCAS	}	Complaint 133 ⁹⁵ / ₁₀₀ ."
vs.		
THE FIRM OF MILLER & COX.		

After this title are the following statements, with others, some of which we omit:

"Comes T. N. Lucas and files three accounts, two against Miller & Cox and the other against Monroe Miller: * * * 1st. Bill of groceries, amounting to 40.61. 2d. Miller & Cox bought of T. N. Lucas * * * bill of groceries, amounting to 49.15. Monroe Miller bought of T. N. Lucas * * * bill of groceries, amounting to 44.19. 133.98.

"On the 26th day of April, 1879, that is, Monroe Miller, of the firm of Miller & Cox, and also one of the defendants in the case, and the plaintiff having this cause of action therein, the accounts as set forth above, amounting to 133.98.

"April 27th, 1879. Comes the defendant Monroe Miller and confesseth that he is indebted to the plaintiff in the sum

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of 133.95, and files his affidavit to that effect; that he justly owes said debt, and does not confess judgment to defraud his creditors. * * * Sworn and subscribed to before me, this 26th day of April, 1879."

Here follows the undertaking of the replevin bail, and the approval by the justice: "I do hereby acknowledge myself replevin bail for the term of 180 days from the rendition thereof, for the stay of the above judgment.

"Dated April 26th, 1879.

J. H. HOPPER.

"Taken and approved by me, this 26th day of April, 1879.

"WILLIAM ARMSTRONG, Justice of the Peace."

On the margin of the transcript, as we find it in the record, is the following: "It is therefore adjudged by me that the plaintiff recover of the defendants Miller & Cox the sum of 133.95, with costs taxed at 1.00. Given under my hand and seal, April 26th, 1879. WILLIAM ARMSTRONG, Justice."

It seems to be agreed by counsel that this marginal entry appears on the docket of the justice, as it is copied in the transcript. When we consider the confusion of dates, the unfinished sentences and unexplained numerals found in this transcript, we are not surprised that many objections were made to it when offered in evidence in the court below, and that they are urged in this court. It will be observed that the name of the party plaintiff is not set out in full, and that the defendants are named as the firm of Miller & Cox. The judgment is in favor of the plaintiff as named in the title of the cause, and against Miller & Cox. Is the judgment, so rendered, void as to appellants Miller and Hopper?

Had either Miller or Cox, at the proper time, made objection in proper manner and form before the justice, the case could not have been proceeded with, legally, in the name of the plaintiff, or against the defendants, as named. This they did not do. It will be observed that Miller confessed judgment. The undertaking of appellant Hopper is for the payment of that judgment. His undertaking, under the statute,

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operates as a confession of judgment by him. 2 R. S. 1876, p. 632. Miller, in confessing judgment, waived all objections that might have been made to the manner and style of naming the parties, and so, too, did Hopper in becoming replevin bail. The judgment, therefore, is not void by reason of the parties being named in the record as they are, but, so far as that objection is concerned, is valid and binding upon the parties to it, including the replevin bail. *Bridges v. Layman*, 31 Ind. 384; *Peden's Adm'r v. King*, 30 Ind. 181; *Thatcher v. Coleman*, 5 Blackf. 76; *Jones v. Martin*, 5 Blackf. 351; *Downard v. Sluder*, 5 Blackf. 559.

It is insisted that the judgment is void, for the reason that the cause of action was not copied in full in the record of the justice. Since the commencement of the case under consideration, this precise question has been considered by this court, and decided adversely to the position of appellants' counsel. With the conclusion reached in that case we are entirely satisfied. *Reed v. Whitton*, 78 Ind. 579. See, also, *Indianapolis, etc., R. R. Co. v. Wilsey*, 20 Ind. 229.

A further objection is made, that the amount of the judgment is not written out in words. The statute above does not make this indispensable to the validity of a judgment. It does not, by the use of negative words, or otherwise, forbid the statement of the amount of the judgment in figures, with the proper dollar mark. In its provisions it is directory; and, while it is very desirable that justices of the peace shall follow and carry out its provisions in the trial of causes and the rendition of judgments, neither reason nor the authorities require of us to hold all of their proceedings and judgments void, because of departures from it in non-essentials.

This statute requires that the docket shall be indexed; but it would be unreasonable to hold that the judgments therein recorded are void for the want of such index. So, too, it requires the justice to keep a docket in a substantially bound book, of a given size; but it will not be contended that a judgment will be invalid because recorded in a book of less

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or greater size, or of a binding not substantial. We have seen, too, that the copying of the cause of action in the docket is not essential to the validity of the judgment. See Freeman Judgments, 2d ed., section 48 a; *Fullerton v. Kelliher*, 48 Mo. 542.

It is further insisted that the transcript does not show a valid judgment, for the reason that the figures, apparently intended to state the amount of the judgment, are abstract numerals, without mark or character to indicate what they represent. From the statement in relation to the accounts upon which the judgment was rendered, it is impossible to tell whether the figures represent so many pounds of groceries, or the value of the same in dollars and cents. There is no dollar mark or other character to indicate the one or the other; and so, in the formal entry of the judgment, figures are used in the same way, without any character or mark to indicate what they represent. It is reasonable to conjecture that they were intended to represent dollars and cents; but, while the courts are generous and liberal in the construction of statutes, to uphold the judgments of these inferior courts, they can not be maintained upon conjecture. These figures, standing as they do, without aid or explanation from other parts of the record, express nothing but abstract numerals. It follows, therefore, that the court below erred in admitting the transcript in evidence, and in overruling the motion for a new trial. *Lawrence v. Fast*, 20 Ill. 338; *People v. San Francisco Savings Union*, 31 Cal. 132; *Hurlbutt v. Butenop*, 27 Cal. 50; *Tidd v. Rines*, 9 Cent. Law J. 338; *Woods v. Freeman*, 1 Wal. 398; *Carpenter v. Sherfy*, 71 Ill. 427; *Avery v. Babcock*, 35 Ill. 175.

All that we decide in relation to the judgment rendered by the justice is, that, as it comes before us in the transcript embodied in the bill of exceptions, it is void for uncertainty in the statement of the amount of the recovery. Interpreted in the light of the pleadings, it may be valid. On the trial of the case, appellee, as appears from a recitation in the bill

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of exceptions, offered to introduce in evidence, what was admitted by appellants to be, the accounts upon which the judgment was rendered, "containing the several items, with the same footed up, and the proper dollar mark prefixed to the footing." This the court excluded. We can not say that the court erred in this, for the reason that the accounts are not in the bill of exceptions; but inasmuch as this cause will be returned for further proceedings below, it is proper to say that if the accounts filed as the cause of action will explain, or tend to explain, the meaning of the numerals used in the judgment, they are proper evidence to go to the court. Freeman Judgments, sec. 48; *Carr v. Anderson*, 24 Miss. 188; *Delavan v. Pratt*, 19 Iowa, 429; *Fowler v. Doyle*, 16 Iowa, 534; 1 Greenleaf Evidence, secs. 511, 514.

It is claimed further, that the confession by Miller did not authorize the justice to render a judgment, because of the want of a sufficient affidavit. As between the parties to the suit and the replevin bail, no affidavit is necessary. *Mavity v. Eastridge*, 67 Ind. 211; *Kennard v. Carter*, 64 Ind. 31; *Barnett v. Juday*, 38 Ind. 86.

Nor is the judgment void as to Miller, because rendered against Miller & Cox. It is said by counsel that, as a partner of the firm of Miller & Cox, Miller had no authority to confess a judgment against the other member of the firm, and that the judgment is, therefore, void as to him. A member of a firm has not, by virtue of his relation to the partnership alone, authority to confess a judgment against his partners; and, if a judgment be entered upon such confession, it will be void as to them, but valid as to him. *York Bank's Appeal*, 36 Pa. St. 458; *Crane v. French*, 1 Wend. 311; 1 Lindley Partnership, 474; Freeman Judgments, sec. 343.

There is some confusion of dates in the transcript, but we can not interpret them as asked by counsel for appellants. The judgment is shown to have been rendered and entered on the 26th of April. On that day Miller made an affidavit that he did not confess the judgment to defraud creditors. On

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the same day the replevin bail was entered, in which entry the existence of the judgment is expressly recognized. Looking to the whole record, we must hold that the other statement, that Miller appeared on the 27th, is a clerical mistake, simply. Such being the case, the record can not be contradicted by parol testimony. The court below, therefore, did not err in striking out portions of Hopper's answer, and in striking out the oral testimony introduced for the purpose of showing that the judgment had not been rendered at the time Hopper became replevin bail. *Pressler v. Turner*, 57 Ind. 56; *Hume v. Conduitt*, 76 Ind. 598; *Larr v. State, ex rel. Wagoner*, 45 Ind. 364; *Argo v. Barthand*, 80 Ind. 63.

Judgment reversed, at the costs of the appellee, with instructions to the court below to sustain the demurrer to the complaint.

No. 9496.

GREEN v. ELLIOTT ET AL.

VERDICT.—*Venire de Novo.*—*Practice.*—A *venire de novo* is awarded when the verdict is uncertain or ambiguous, or does not fully find upon the issues, or fails to assess damages.

HIGHWAY.—*Location.*—*Appeal.*—*Statute Construed.*—*Cases Criticised.*—An appeal to the circuit court from an order of a board of commissioners establishing a highway presents in the latter court for decision only such questions and issues as have been made before the board or by proper amendment on appeal. Section 5777, R. S. 1881, can not be applied, in its literal construction, to such an appeal. *Scraper v. Pipes*, 59 Ind. 158, and *Bowers v. Snyder*, 66 Ind. 340, criticised.

SAME.—*Public Utility.*—Whether a proposed highway will be of public utility depends not upon an absolute necessity for it, but whether the public convenience requires it.

SAME.—*Dedication.*—*Evidence of Public Acceptance.*—A highway may become public by dedication by the owner of the land, and an acceptance thereof by the public; and public use of it, without any public work having been done upon it, may evince such acceptance.

From the Fayette Circuit Court.

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143	179

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148	149
149	457
151	74

86	53
153	245

86	53
155	656

86	53
158	343

86	53
160	659

86	53
163	235

86	53
164	434

86	53
169	402

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H. C. Fox, T. M. Little and J. I. Little, for appellant.

C. Roehl, B. F. Claypool and J. H. Claypool, for appellees.

BICKNELL, C. C.—Petitions were filed before the county board for the opening of two highways. On the presentation of the petitions the appellant appeared and moved to dismiss them for insufficiency in the description of the route, as to its beginning, course, termination and length. These motions were overruled. Viewers were appointed in each case, who reported in each case that the highway was of public utility, and would run through the appellant's enclosure of more than one year's standing, and that a good way could not otherwise be had, and that they had laid out and marked the roads thirty feet wide, fifteen feet on each side of the lines described in the petitions. The appellant filed a remonstrance in each case, alleging that the road would not be of public utility, but making no question as to enclosures. The board then appointed reviewers in each case, who, in each case, reported that the road would not be of public utility. After the return of these reports the appellant filed in each case a petition asking for damages. The board in each case refused to open the highway and refused to appoint viewers to assess damages. This was a final judgment. The only remedy of a party aggrieved thereby was by appeal. *Doctor v. Hartman*, 74 Ind. 221.

The appellee, who was one of the petitioners in each case, appealed in each case to the circuit court.

On the docket of the circuit court the causes were numbered 2273 and 2274, and it was agreed that they should be tried together by a jury, with separate verdicts. The jury found a verdict for the appellee in each case, with \$40 damages for the appellant in No. 2273, and \$430 damages for the appellant in No. 2274. With their verdict they returned interrogatories and answers as follows:

"1. Will the location of a public highway upon the route designated as No. 2 be of public utility? Ans. Yes." (This referred to the highway in No. 2274.)

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"2. Will the location of a public highway upon the route designated as No. 3 be of public utility? Ans. Yes." (This referred to the highway in No. 2273.)

"3. Did Green open the way designated as No. 6 intending to dedicate it to the public? Ans. Yes.

"4. Did the public accept such dedication? Ans. No."

The appellant moved for a *venire de novo*, and assigned ten reasons therefor. This motion was overruled. The appellant then moved for a new trial. This motion was overruled. Judgments were rendered in accordance with the verdicts, and directing that the causes be remitted to the county board "to carry out the judgments of the court and the findings of the jury." This was a proper form of judgment on such findings. *Board, etc., v. Small*, 61 Ind. 318. The appeal was then taken to this court. The errors assigned are:

1. Overruling the motions for a *venire de novo*.
2. Overruling the motions for a new trial.
3. Rendering judgments on the verdicts over the appellant's objection.

Of the ten reasons for a *venire*, the first is, that the verdict does not purport to contain all the material facts given in evidence on the trial. The seventh is, that the jury did not lay out and mark the said highways, or either of them, on the best ground not running through any person's enclosure of more than one year's standing. The eighth is, that the jury did not find whether or not the said highways, or either of them, would run on the line dividing the lands of two individuals, and if so, that each should give half of the road. The ninth is, that the jury did not find whether or not a certain highway designated as No. 6 had been dedicated to public use or not. The tenth is, that the jury did not, in its verdict, give a full description of the location of said highways, or either of them, by metes and bounds or courses and distances.

None of the foregoing reasons are sufficient for a *venire de novo*. A *venire de novo* is granted when the verdict, whether general or special, is imperfect by reason of some uncertainty

or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages. 2 Tidd Pr. 922; Gould Pl. 526; *Bosseker v. Cramer*, 18 Ind. 44. None of these matters are presented by said first, seventh, eighth, ninth and tenth reasons. The second, third, fourth, fifth and sixth reasons alleged for the *venire de novo* all have reference exclusively to the question of enclosures, which the appellant claims was put in issue in these proceedings. He says in his brief: "The court will observe that the question whether the proposed highways would run through enclosures of more than a year's standing is variously stated in the motion; but, theoretically, all amounting substantially as stated in the fifth reason."

Under this presentation, the fifth reason only is to be considered. It is as follows:

"The jury did not find that the said proposed highways, or either of them, did or did not run through the enclosures of any person of more than a year's standing at the time the petitions were filed; and, also, that the owners of said enclosures had consented thereto; or, if they did not consent, that a good way could not otherwise be had."

If the question of enclosures was not "put in issue," the verdict was not defective; a verdict ought not to find more than the issues.

The question is, what is "put in issue" on an appeal to the circuit court in a proceeding to open a highway? The issues may be different in different cases; in some, important matters may have been expressly admitted; in others, important matters may have been waived; in others, nothing may have been either admitted or waived. The highway act grants an appeal to anybody aggrieved by the decision of the county board, but provides no mode of trial; 1 R. S. 1876, p. 533, section 26; and the courts have held that a highway appeal is governed by section 36 of the commissioners' act, 1 R. S. 1876, p. 357, and must "be heard, tried and determined as an original cause." It would seem that this means the appeal must be tried as an original cause, and the appeal is taken from

the decision of the court below upon the matters put in issue and tried there; but the appellant claims the meaning to be, that in the circuit court the proceedings and proof of the petitioner must be the same as before the county board. This proposition can not be maintained. Many things are required before the county board which can not be done in the circuit court; viewers and reviewers can not be appointed in the circuit court; nor can the jury be sent out to "locate the road and mark it on the best ground."

In such a case, if section 36 of the commissioners' act, *supra*, is applicable to highway appeals, it should receive a reasonable construction. The object of such an appeal is to give the party a trial in the appellate court of all the controverted facts.

Facts expressly admitted, or matters, the objections to which have been waived, or have not been controverted in the lower court, ought not, upon general principles, to be investigated again in a proceeding where a literal construction of section 36, *supra*, is impossible, and where the court is compelled to determine, and has determined, that only a part of the proceedings below can be repeated in the appellate court.

The proceedings begin *ex parte*, but persons interested may come in and object. They may object to the sufficiency of the petition, to the sufficiency of the notice, to the competency of the viewers. 1 R. S. 1876, p. 535, sec. 46. They may object to the proceedings of the viewers for non-conformity with the statute; they may raise the question as to inclosures, or whether the road is properly laid out and marked, and they may question the public utility of the road, and may claim damages; and it has been held that the questions of public utility and damages may be united in the same remonstrance, and that when these questions are made by separate remonstrances, it is immaterial which was filed first. *Butterworth v. Bartlett*, 50 Ind. 537; *Bowers v. Snyder*, 66 Ind. 340; *Peed v. Brenneman*, 72 Ind. 288; *Sparling v. Dwenger*, 60 Ind. 72; *Schmied v. Keeney*, 72 Ind. 309.

There are no adversary proceedings and no issues, until

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somebody has appeared and made them. When an issue is made it is determined by the county board by its own mode of proceeding ; as to matters not objected to there is no issue. On an appeal to the circuit court, it would seem that there should be a trial there as an original cause of the issues tried below, and not of matters admitted or waived, or about which no question was made and no adversary proceedings were had below.

. These conclusions upon general principles and upon analogy are sustained by the decided cases. In *Milhollin v. Thomas*, 7 Ind. 165, it was held that after an appearance and remonstrance before the county board, on the ground of public inutility only, the party could not object in the circuit court on appeal for want of jurisdiction.

In *Kemp v. Smith*, 7 Ind. 471, where, as in the present case, there was a remonstrance for inutility, and also a claim for damages, this court, recognizing the rule that the appeal must be tried as an original cause, nevertheless said : “ It does not seem to have been the intention of the Legislature that the same proceedings should be gone through with on the trial of an appeal, as are required before the board of commissioners. Manifestly some of them are not to be repeated, such as the original petition, notice, the first view, etc. The object of the appeal is, we think, to give the parties the benefit of a trial of questions of fact, in a court where a jury can be called, where the rules of law can be applied, and the points in controversy judicially determined ; such as, whether the road is of public utility, or whether an objector has sustained damages, and how much, if any.” The court, in this case, set aside an appointment of viewers which had been made by the circuit court.

In *Daggy v. Coats*, 19 Ind. 259, this court, speaking of an appeal where there had been no objection below, said : “ We take it, that no new ground in favor of, or against, the proposed highway, can, as matter of right, be there filed.” And, speaking of an appeal after an objection for non-utility, or a claim for damages, as in the present case, the court said : “ In such

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a case the notices would be admitted or waived, and proof of them would not have to be made" in the appellate court.

In *Sidener v. Essex*, 22 Ind. 201, the objection before the county board was, as in the present case, for inutility, with a claim for damages; an offer was made in the circuit court on appeal; to prove that the original petition was not signed by twelve freeholders. This court said: "As we have seen, the only questions presented by the remonstrance, and submitted to the jury, related to the utility of the road and the question of damages. It follows the proposed evidence was not pertinent to the issues, and therefore inadmissible."

In *Smith v. Alexander*, 24 Ind. 454, the claim before the county board was for damages only. In the circuit court on appeal an objection was made to the notice. This court said: "They did not object" before the county board "to the sufficiency of the notice; * they simply claimed damages. * * The only question * was the amount of damages, if any. * * This, in effect, was the issue, and was the only question to be tried, on appeal, in the circuit court. The remonstrants might also have put in issue the public utility of the highway, but they did not."

In *Wilson v. Whitsel*, 24 Ind. 306, there was a remonstrance for inutility. In the circuit court on appeal there was a motion, founded on affidavit, to strike out the petition because it was not properly signed. This court held that, as no such objection was made below, it came too late in the circuit court. One of the errors assigned was that the verdict of the jury was not upon the issue. As to this the court said: "The only issue in the cause was made by the remonstrance, denying that the proposed change was of public utility. That was the issue properly submitted to, and passed upon by, the jury."

In *Crossley v. O'Brien*, 24 Ind. 325, it was held that an objection that the names of the persons, through whose lands the highway would pass, were not sufficiently stated in the petition, is waived if not made before the appointment of viewers, and that the course required by the statute, where

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enclosures interfere, is a thing not necessary to give jurisdiction, but is a mere proceeding in the matter after jurisdiction is obtained.

In *Little v. Thompson*, 24 Ind. 146, there was a remonstrance for inutility and a claim for damages, as in the present case. This court held that the facts necessary to give jurisdiction to the county board in a highway case are: 1st. That the requisite notice of the petition has been given. 2d. That the petition is signed by twelve freeholders of the county. 3d. That six of the petitioners were of the immediate neighborhood of the road. And that the time for objecting to these jurisdictional facts is the time when the petition is presented, and that if not then made, the finding and judgment of the board upon such facts is conclusive, and that the questions of public utility and damage formed the issues in the case, and that no question as to the jurisdiction could afterwards be raised in the circuit court.

In *Wright v. Wells*, 29 Ind. 354, where there was a remonstrance for inutility and a claim for damages, it was held that proof of publication of the notice of the petition is a jurisdictional fact to be determined by the county board before the appointment of viewers, and that after the board has taken jurisdiction by appointment of viewers, objection to such proof can not be made either before the board or in the circuit court on appeal. The court said that sections 19 and 23 of the highway act "are the only provisions of the act authorizing an adversary appearance," and they authorize it for the purpose only of objecting for inutility or claiming damages. "These," says the court, "seem to be the only questions, outside of the sufficiency of the petition to give the board jurisdiction, which can be presented by such parties," that is, by parties who make an adversary appearance under sections 19 and 23.

In *Cummins v. Shields*, 34 Ind. 154, there was a remonstrance for inutility, and another remonstrance which claimed damages and alleged that the road would run through the remonstrants' enclosures. This court, by WOR-

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DEN, J., said that the appellant "did not, in his remonstrance or otherwise, * claim that the proposed highway run through his enclosure of one year's standing, without his consent, and that a good way could otherwise be had, and therefore that it ought not to be laid through his land at all, but impliedly waived any objection of that sort, by failing to set it up, and by asking that his damages be assessed for thus laying the highway through his land." There was no question involved or in issue as to the right of the petitioners to have the highway laid through an enclosure of a year's standing, and the court said: "We have seen that in the papers filed before the commissioners there was no question of this sort made. On the contrary, it was waived by irresistible implication; for, instead of objecting to the road being laid through his land on account of running through his enclosure of a year's standing, he asks for damages" and viewers. "When he appeared before the commissioners and made his two points, the inutility of the road and his claim for damages, he waived all others. * * There is no reason why, in the court of the county commissioners, a party shall be held to have the benefit of a defence that he does not make, any more than in any other court." In the circuit court the only questions in issue were as to the utility of the proposed road and the damages claimed.

In *Fisher v. Hobbs*, 42 Ind. 276, the remonstrance alleged that the road would pass through and across the remonstrant's land, and claimed \$1,000 damages. This was the same as the second remonstrance in the case at bar, which alleges that the road will pass over remonstrant's land, to his damage, etc., but says not a word about the road passing through his enclosure of more than a year's standing without his consent, or that a good way can otherwise be had.

In the circuit court there was a motion for a new trial because the court had excluded evidence offered by the appellant as to public utility, and because the court had charged the jury that they had nothing to do with the question of public utility. This court held that the motion for a new trial was properly

overruled, and said: "The appellant appeared in the commissioners' court and made no objection to the sufficiency of the petition, the giving of notice, or as to the utility of the proposed highway, but filed his claim for damages. By so doing, he waived all questions of irregularity in the proceedings and as to the utility of the road."

In *Sowle v. Cosner*, 56 Ind. 276, this court said: "Having filed his remonstrance at the same time the petition was filed, and having failed then to object to the sufficiency of the petition, his" (appellant) "subsequent objections on that ground came too late, the right to make them having been waived." In *Turley v. Oldham*, 68 Ind. 114, this court said: "The record shows that the appellant moved the county board to dismiss this case, 'owing to an insufficiency in the number of names of freeholders on the original petition.' * This may well be regarded, we think, as at least an implied waiver of all other objections, if any existed, to the sufficiency of the petition."

Where, however, the petition is so insufficient as to form no basis for the action of the county board, such a defect can not be waived; an objection thereto would be fatal at any stage. *Hays v. Campbell*, 17 Ind. 430. It would be good in arrest of judgment in the circuit court. *Hughes v. Sellers*, 34 Ind. 337; *Shute v. Decker*, 51 Ind. 241; *Doctor v. Hartman*, 74 Ind. 221.

In *Schmied v. Keeney*, 72 Ind. 309, this court said: "It is a well established rule of practice, that, upon an appeal from an order of a board of commissioners establishing or changing a highway, the cause must be tried *de novo*; that is to say, that all questions in issue before the commissioners must be again tried in the circuit court. * * * Where a remonstrance is filed by the owner of lands along the line, either against the public utility of the proposed highway, or on account of the damages he will sustain," etc., "such remonstrance constitutes an answer to the petition, and tenders an issue which must be examined by the commissioners, and must be tried on an appeal to the circuit court. Where such land-owner remonstrates against the public utility of the road, and also on ac-

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count of the damages, two issues are presented which must be tried in the circuit court on an appeal from proceedings to establish the highway."

Here is an unbroken line of decisions from 1856 to 1879, all conceding that a highway cause, on appeal, must be tried as an original cause, but all holding that, except as to certain defects in the petition, objections not made before the county board are waived, and that the issues to be tried as an original cause, on appeal in the circuit court, are the issues made and tried before the county board, except so far as such issues are subject to proper amendments under the general rules of law. *Hedrick v. Hedrick*, 55 Ind. 78.

These cases furnish an intelligible and reasonable rule, by which nobody can be misled. They give a reasonable construction to sec. 36 of the commissioners' act, as applied to highway appeals, a literal construction being confessedly impossible. The appellant, however, claims that they are all overruled by certain recent decisions, which we will now examine.

The first of these is *Hays v. Parrish*, 52 Ind. 132; but this merely declares, "it may be observed that it is not the practice, on appeal to the circuit court in such cases, to appoint viewers, but to try the cause *de novo*," citing *Kemp v. Smith*, *supra*, *Daggy v. Coats*, *supra*, and *Sidener v. Essex*, *supra*. This case was decided in 1875, and is exactly in accordance with *McPherson v. Leathers*, 29 Ind. 65, decided in 1867, and both of them, instead of overruling, cite and reaffirm the leading cases hereinbefore referred to.

The next case is *Scraper v. Pipes*, 59 Ind. 158, decided in 1877. Here, after viewers had been appointed, the appellants appeared and moved before the county board to dismiss the proceedings. This motion was overruled, but the board set aside the viewers' report and appointed other viewers; two of these reported that the road would be of public utility. The appellants then filed a remonstrance alleging the inutility of the road, and other viewers were appointed, who reported

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that the road would be of public utility. The board ordered the road to be opened, and the remonstrants appealed. In the circuit court the motion to dismiss the proceedings was renewed and overruled. The cause was tried by a jury, who returned a verdict that the proposed highway would be of public utility. The appellants moved for a *venire de novo* and in arrest of judgment, both of which motions were overruled, and such rulings were assigned as errors on an appeal to this court. It was held that the circuit court erred in overruling the motion to dismiss the proceedings for the insufficiency of the petition. This was exactly in accordance with all the preceding cases. The objection, having been made before the county board, was renewable in the circuit court. This was enough to reverse the case, but the court proceeded: "It seems very clear to us, that the court below erred in overruling the appellant's motion for a *venire de novo* in this case. In highway cases, on appeal to the circuit court, there must be a trial *de novo* of the whole case." And for this the court cited *Kemp v. Smith, supra*, *Daggy v. Coats, supra*, and *Sidener v. Essex, supra*, every one of which affirms the doctrine that the whole case to be tried *de novo* is the case which was tried before the county board, giving to the express and implied admissions of the parties the same effect in the circuit court that they had before the county board.

The court continued: "The verdict of the jury * was defective in this, that it was expressly limited by its terms to a finding upon one single question of fact, and none other." The court further said: "There should be a general finding for the petitioners by the court or jury trying the cause, of all the facts which the board of commissioners would have been required to find in such a case." But all the cases show that objections properly waived before the county board are considered as waived in the circuit court.

The decision in *Scraper v. Pipes* does not expressly overrule any case. The appellants claim that it overrules the very cases it cites as authority; but since that decision this

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court has decided *Turley v. Oldham*, 68 Ind. 114, and *Schmied v. Keeney*, 72 Ind. 309, reaffirming the earlier decisions, citing as authority *Fisher v. Hobbs*, *supra*, *Smith v. Alexander*, *supra*, *Sidener v. Essex*, *supra*, and *Daggy v. Coats*, *supra*, and with them citing this same case of *Scraper v. Pipes*, by which, the appellants claim, all the others were overruled.

The conclusion is irresistible that *Scraper v. Pipes* was not intended to overrule any of the previous decisions. Anything in it apparently inconsistent with the former rulings was not followed in the more recent cases of *Turley v. Oldham*, *supra*, and *Schmied v. Keeney*, *supra*.

The next case cited by appellants is *Sparling v. Dwenger*, 60 Ind. 72. Here the court said, the appellee should have filed a remonstrance, and then, "on such appeal, he could have obtained a decision of all the questions, whether of law or fact, involved in the original cause or proceeding." This is in accordance with the previous decisions. An appeal brings up the questions involved, but not matters about which no question was made. The next case referred to by appellants is *Bowers v. Snyder*, 66 Ind. 340. Here there was a remonstrance for utility, and viewers were appointed who reported that the road would be of public utility; there was then an application for damages, and for the appointment of other viewers to assess them; this application was rejected by the county board who established the highway. On appeal to the circuit court, the point decided was, that the county board ought not to have rejected the application for damages. The court said, incidentally, "In these highway cases, the law is well settled, that there must be a trial *de novo* of the whole case, on an appeal from the board of commissioners to the circuit court;" and for this they cited *Sidener v. Essex*, *supra*, and *Scraper v. Pipes*, *supra*; but the case of *Sidener v. Essex* is one of the cases claimed to be overruled by *Scraper v. Pipes*, and yet it is here cited by the court in connection with the very case which the appellants claim has overruled it. In *Sidener v. Essex*, the only questions

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presented by the remonstrance related to utility and damages, and the court held that nothing else could be considered. The next case cited by appellants is *Grimwood v. Macke*, 79 Ind. 100. The point ruled in this case was, that the improper rejection by the county board of a report of viewers does not deprive the board of jurisdiction of the subject-matter. This was in accordance with all the cases, and overruled nothing. The last case cited by appellants is *Cox v. Lindley*, 80 Ind. 327. In this case the court said: "In a case like this, an appeal either suspends or vacates all the proceedings had before the commissioners, and brings the cause before the circuit court for trial *de novo*. A further appeal to this court, therefore, only requires a review of what occurred in the circuit court." The court cited *Scraper v. Pipes*, *supra*; *Turley v. Oldham*, *supra*; and *Schmied v. Keeney*, *supra*.

The foregoing review shows that the proposition stated by the appellants in their brief, to wit, "That the petitioners, in an appealed highway case, are required, in order to recover, to prove their whole case as they were required to prove it originally before the commissioners," can not be sustained.

The same proceedings can not be had in the circuit court as before the county board. In the circuit court the matter to be tried *de novo* is the matter which was in controversy before the county board, unless the issues be amended in the circuit court as hereinbefore stated. The petitioners are not required to prove in the circuit court matters upon which no issue was made below, or matters, the regularity of which was either expressly or impliedly admitted below. *Kemp v. Smith*, *supra*; *Daggy v. Coats*, *supra*; *Sidener v. Essex*, *supra*; *Smith v. Alexander*, *supra*; *Crossley v. O'Brien*, *supra*; *Little v. Thompson*, *supra*; *Wright v. Wells*, *supra*; *Cummins v. Shields*, *supra*; *Fisher v. Hobbs*, *supra*; *Sowle v. Cosner*, *supra*; *Turley v. Oldham*, *supra*; *Schmied v. Keeney*, *supra*.

In the case at bar the following was the form of the verdict: "We, the jury, find for the petitioners in case No. 2273, and that the highway therein petitioned for would be of

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public utility ; we further find that the remonstrant thereto is entitled to damages in the sum of forty dollars (\$40).” This was a general finding for the plaintiffs ; but if there had been no such general verdict, but merely a verdict upon the questions of public utility and damages, that would have been sufficient without any reference to enclosures, because no objection having been made before the county board as to enclosures, the regularity of the proceedings in that respect was admitted ; any objections in that behalf were waived, and the cause taken to the circuit court to be tried was the cause upon which the adversary proceedings were had below. There was, therefore, no error in overruling the motion for a *venire de novo* ; there was no imperfection in the verdict.

As to the motion for a new trial, the appellant says in his brief: “ We will not attempt to discuss all the reasons assigned in the motion for a new trial, but will confine ourselves mainly to the first three, which are as follows : ”

1. Error of the court in giving instructions.
2. Error of the court in refusing to give instructions.
3. Error of the court in refusing to submit to the jury interrogatories put by the defendant.

The appellant says in his brief, that “ The question of enclosures is substantially presented in the first, second, third and fourth instructions given by the court. It is also directly presented by the refusal of the court to give instructions numbered 3, 4 and 11 asked for by defendant ; those numbered 2, 3, 4, 6, 7 and 8 present the same point and no other. Thus, by the motion for a new trial, the question of enclosures is squarely presented.” The record shows that the court of its own motion gave instructions numbered from 1 to 20. We find nothing in the first four of these in reference to enclosures. No. 10 of these instructions is as follows : “ Under the papers filed and the issues to be tried in this case you have nothing to do with the question of enclosures. That question is not raised, and is, therefore, not involved in your investigations.” It follows, from what has been hereinbefore stated,

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that there was no error in this instruction. *Cummins v. Shields, supra*; *Wright v. Wells, supra*; *Sidener v. Essex, supra*; *Little v. Thompson, supra*; *Crossley v. O'Brien, supra*.

The appellant claims that instructions numbered 7, 8 and 9, given by the court of its own motion, were incorrect and likely to mislead the jury in reference to the law of dedication. In these instructions the court told the jury that, upon the question of the public utility of the proposed highways, they should consider what highways were already existing in the vicinity, and that, if a certain road designated as No. 6 were a public highway, it should be considered, otherwise not; and, it being claimed that said road No. 6 had become a highway by dedication, the court told the jury what would constitute a dedication, and that, besides a dedication, there must be an acceptance; and the court also told the jury what circumstances ought to be considered in determining whether there had been an acceptance or not; and that such a dedicated road might become a highway by public use, although never worked by the supervisor or by anybody else.

We think that these instructions were not likely to mislead the jury, and were right.

The appellant objects to the definition given by the court, in its instruction No. 6, of the phrase "public utility." The court said: "Now, what is public utility? I answer, very briefly, it is a road required for public convenience, not one that is an absolute necessity to the public, but one that the convenience of the public requires." The distinction between necessity and utility was here correctly indicated. What the public convenience requires is useful to the public, although it may not be an absolute necessity. Instruction No. 6 was substantially right.

If there were any objections to the other instructions given by the court they are not discussed in the appellant's brief, and are, therefore, regarded as waived.

The court refused instructions asked for by defendant, numbered 1, 2, 3, 4, 6, 8, 8½, 11, 13, 14, 15, 16, 19, 20, 22, 23, 24,

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25 and 26. As to these, no question is made in the appellant's brief as to Nos. 1, 2, 8, 24, 25 and 26. Nos. 3, 4 and 11 call upon the jury to consider the question of inclosures, the same question embraced in the tenth instruction given by the court of its own motion. The tenth instruction of the court being right, as heretofore shown, it follows that said instructions 3, 4 and 11 were properly refused.

There was no error in refusing to give said instructions Nos. 6, 8½, 14, 15, 16, 19, 20, 22 and 23. The proper instructions upon the subjects thereof were embraced in the instructions given by the court of its own motion. Instruction No. 13 asked for by defendant was properly refused, because it required the jury to find upon a question not before them, and it was inconsistent with the instructions Nos. 7, 8 and 9, given by the court of its own motion.

The only matter stated in the appellant's brief, as to the alleged error of the court in refusing to submit the defendant's interrogatories, has reference to said interrogatories Nos. 2, 3, 4, 5, 6, 7 and 8. The appellant says that these interrogatories present the same question as to inclosures, and none other, that was presented by the motion for a *venire de novo*. Therefore, the same reasons, hereinbefore given, which sustain the action of the court in overruling that motion, also sustain its action in refusing to submit said interrogatories.

We have now examined all the errors assigned which the appellant has thought it important to discuss in his brief. He says, at the close of his argument, "Many questions were raised upon rulings made by the court during the progress of the trial, all of which are set forth in the bill of exceptions, and in the motion for a new trial. The reasons why the exceptions were taken are fully stated in the record, to which we direct the attention of the court, and ask that they be considered. We will not take them up in detail, as this brief is already too much extended."

The rule is that errors assigned and not argued are waived.

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Tracewell v. Peacock, 55 Ind. 572; *Griffin v. Pate*, 63 Ind. 273; *Goldsberry v. State*, 69 Ind. 430.

In *Yeakle v. Winters*, 60 Ind. 554, the statement in the brief was as follows: "The reasons assigned in the motion for a new trial are numerous, and we fear your Honors would consider it tedious, and perhaps useless, to consider them in detail. Therefore we say nothing other than that we insist upon them here earnestly, and ask your Honors to consider them as assigned." This court held that all such reasons were waived, and said: "We must be excused from hunting for what the counsel could not find in his own case."

The statement in the case at bar does not differ substantially from that in the case just cited, and is subject to the same rule.

We have found no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9396.

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86	70
134	430
86	70
153	494

REVIEW OF JUDGMENT.—*Complaint.*—*Causes.*—*Default.*—A complaint to review a judgment by default for error of law will lie only for such errors as might be available in the Supreme Court on appeal, viz.: 1. That the court rendering the judgment had no jurisdiction of the subject-matter. 2. That the facts averred in the complaint did not make a cause of action. Error in the form of a judgment by default, or a defect in the title of the complaint on which such judgment was rendered, are not sufficient grounds for review.

SAME.—*Complaint for Foreclosure of Mortgage.*—A complaint good for the foreclosure of a mortgage, but not sufficient to warrant a personal judgment, is sufficient to resist a review of a judgment of foreclosure and *in personam* by default, which is sought on the ground that the facts in the complaint did not show a cause of action.

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SAME.—A complaint to review a judgment of foreclosure and *in personam* by default, only alleging as cause for review that the complaint in the original action did not state facts sufficient to constitute a cause of action for a personal judgment, is bad on demurrer.

From the DeKalb Circuit Court.

R. S. Robertson and J. B. Harper, for appellants.

A. A. Chapin, for appellees.

BLACK, C.—This was a suit by the appellants, William W. Shoaf and Eliza Shoaf, his wife, against the appellees, James Joray and Thomas M. Stephens.

The complaint alleged, that “on the 21st of June, 1877, said James Joray recovered a pretended judgment and decree of foreclosure against these plaintiffs and said Thomas M. Stephens, in the DeKalb County Circuit Court, upon a complaint theretofore filed in said court, in which said Joray was plaintiff and said Stephens and these plaintiffs were defendants; that said judgment and decree were rendered by default, and said defendants not appearing thereto; a full copy of which judgment and all the papers and proceedings in said cause being filed herewith and made and referred to as part of this complaint; that there are errors of law appearing upon and in the proceedings and judgment aforesaid, as follows, to wit:

“1. The complaint in said action does not specify the name of the county in which the action is brought.

“2. That said complaint does not show any consideration whatever for the promise upon which said plaintiffs were sued, and does not state facts sufficient to constitute a cause of action against these plaintiffs, upon which a personal judgment could be rendered.”

The third and fourth specifications are expressly waived by counsel for appellants in their brief.

“5. That the judgment rendered in said action is erroneous in this, that there is no personal judgment against the defendants therein for any fixed and determined amount, but for an uncertain and undetermined balance, leaving the same to be judicially determined by the ministerial officers of the court.

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"All of which errors plaintiffs say are apparent upon the face of the record, and the proceedings in said cause. That this plaintiff, William W. Shoaf, has a just and meritorious defence to said action, which is a bar to a recovery therein, except as to the foreclosure of said mortgage; that, when served with summons in said cause, he believed that he was only made a party thereto for the purpose of barring and foreclosing his interest in the mortgaged premises, which he had theretofore purchased; but that he had not assumed or promised to pay said mortgage debt, and had no reason to suppose that any claim would be made to that effect, and, so believing, he did not authorize any attorney or other person to appear for him in said suit, he being willing to permit said plaintiff therein to take his judgment of foreclosure without further costs, and that no attorney did appear for him or said Eliza Shoaf by their procurement or consent, or that of either of them; that he did not know that said Joray claimed to have, or did have, a personal judgment against him, until an execution was issued to the sheriff of Allen county, some time about the month of March, 1880, which was threatened to be levied upon property of this plaintiff; and that an execution is now in the hands of the sheriff of said county, which he threatens to levy on the property of this plaintiff. Wherefore they pray that said judgment be reviewed and reversed as far as the same seeks to declare and adjudge a personal judgment against said William W. Shoaf, and that the same be annulled and set aside, and for other proper relief."

A complaint to review a judgment for "error of law appearing in the proceedings and judgment" will lie where the judgment was taken as in this case, only for such errors as may be assigned on appeal to this court from a judgment rendered upon default; that is to say, when the court which rendered the judgment had no jurisdiction of the subject-matter, or when the complaint did not state facts sufficient to constitute a cause of action. *Searle v. Whipperman*, 79 Ind. 424.

The transcript of the original action filed with the com-

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plaint for review showed that the original action was commenced, and the proceedings therein were all had, in the court in which the complaint for review was filed, the DeKalb Circuit Court, of this State; and the complaint in the original action alleged that the real estate, the mortgage upon which it was by said complaint sought to foreclose, and which was foreclosed in said original action, was situated in DeKalb county, Indiana.

The first specification of error in the complaint for review had reference, we learn from the briefs, to a supposed insufficiency of the title of the cause contained in the complaint in the original action. The title specified the name of the court, of which the name of the county in which the action was brought constituted a part, thus: "In DeKalb Circuit Court." If it would have been proper, for full compliance with the statute, to again state the name of the county in the title, as claimed on behalf of the appellants, which we need not decide, such an objection to the complaint could not be first raised in this proceeding to review the judgment, for the objection did not reach either of the questions which might be raised in the complaint for review.

The fifth specification, purporting to point out an error in the form of the judgment, could not be considered in such proceeding, for the same reason.

The third specification alleged the insufficiency of the facts stated in the complaint in the original action, not generally, but only in certain respects, the alleged insufficiency relating only to the rendition of a personal judgment.

The original action was brought by said Joray as assignee upon a promissory note made by said Stephens and to foreclose a mortgage on real estate executed by him to secure said note, the complaint alleging that the mortgaged premises had been conveyed to the appellant William W. Shoaf, and that he had assumed the mortgage debt as a part of the consideration.

It was alleged in the complaint for review, as we have seen,

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that the plaintiff in the original action recovered a judgment and decree of foreclosure; and it appeared from the record filed as an exhibit, that not only was there a personal judgment against said Stephens and said William W. Shoaf, but there was also a foreclosure of said mortgage against all the defendants in said original action. It was admitted in the complaint for review, that said William W. Shoaf had purchased the mortgaged premises, and it was alleged that he had a meritorious defence, except as to the foreclosure of the mortgage. There was no judgment for the recovery of money or for costs against the appellant Eliza. It was, in effect, admitted in the complaint for review that the foreclosure of the mortgage was right as to both the appellants.

If, the court having jurisdiction of the subject of the action, the complaint stated facts sufficient to constitute a cause of action to foreclose the mortgage, the appellants could have no remedy by a proceeding to review the judgment; and in their complaint for review they made no specification of error which authorized the court below, or which authorizes this court, to examine as to the sufficiency of the facts stated in the complaint in the original suit to constitute a cause of action for foreclosure.

Under the circumstances, we need not decide the question argued by counsel, as to whether the complaint was bad for failure to show that appellant Eliza had such an interest as to authorize her joinder as a plaintiff.

We think the demurrer was properly sustained, and that the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it hereby is affirmed, at the costs of appellants.

Opinion filed at the May Term, 1882.

Petition for a rehearing overruled at the November Term, 1882.

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No. 10,004.

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SUPREME COURT.—*Dismissal.*—*Submission.*—*Waiver.*—A motion to dismiss an appeal because the certificate to the transcript is insufficient, and because the appellant has not numbered the pages of the transcript, and has not placed marginal notes upon them, will not be sustained after a joinder in error and the cause has been submitted by agreement.

PARTITION.—*Remarriage of Woman Abandoned by First Husband.*—*Evidence.*—*Presumption of Death.*—*Decedent's Estates.*—In an action of partition by a woman who claimed to be the surviving widow of a decedent, and as such to be entitled to one-third of the land of which he died seized, wherein two of the decedent's children by a former marriage alleged that the plaintiff's marriage was void because she was the wife of another man when she married their father, proof that her first husband had abandoned her more than six years before her marriage to the decedent, which was nearly twenty years before the trial, and that he has never been heard of since, raises a presumption that he was dead, and that he died before the plaintiff's marriage to the decedent.

SAME.—*Admissions.*—*Witness.*—*Widow.*—In such case, if the defendants call a witness who testifies that the plaintiff admitted that her first husband was living after her second marriage, and it does not appear that such admission was made in the decedent's presence, the plaintiff is a competent witness to testify concerning the same matter.

SAME.—*Finding of Court Against Testimony of Competent Witness.*—The plaintiff is entitled to a trial of the cause upon the theory that she is a competent witness, and where the court before whom said cause is being tried hears her statement, which, if believed, was sufficient to disprove the admissions, but says that if the cause was being tried before a jury he would not permit her to testify, and finds against her, a new trial will be granted, as it is apparent that the cause has been tried upon the theory that she was not competent to testify.

From the Vigo Circuit Court.

F. Heiner, I. N. Pierce and T. W. Harper, for appellant.

D. W. Henry, S. C. Davis and S. B. Davis, for appellees.

BEST, C.—This action was brought by the appellant against the appellees, for the partition of a lot in the city of Terre Haute.

The complaint averred, in substance, that Thomas Cooper died seized of the lot, in May, 1881, leaving the appellant, his

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widow, and the appellees, Thomas, Chauncey, Milly and George Cooper, his only children and heirs at law, to whom said lot descended, and that they hold the same as tenants in common.

Thomas and Chauncey were children by a former marriage, and they, by their guardian, filed an answer, alleging that, at the time the appellant was married to their father, she was the wife of another man, and by reason thereof they own the whole of said lot. Milly and George answered by guardian *ad litem*. The issues were tried by the court, and, over a motion for a new trial, judgment was rendered for the appellees. The order of the court in overruling the motion for a new trial is assigned as error.

The appellees moved to dismiss the appeal because the certificate of the clerk to the transcript is insufficient, and because the appellant has not numbered the pages of the transcript, nor placed marginal notes upon them. This motion was made long after there was a joinder in error, and after the cause had been submitted by agreement. It comes too late. The joinder in error and the agreement to submit waive these objections. *Field v. Burton*, 71 Ind. 380; *Ridenour v. Beekman*, 68 Ind. 236. This motion is overruled.

The motion for a new trial was based upon the ground that the finding was contrary to the evidence and the law.

The following facts, the most of which were agreed upon, are undisputed, viz.: That the appellant was married to William Boswell in 1849, in Baltimore, Maryland; afterwards they removed to this State, and lived together until April, 1862, when he abandoned her; that, on the 5th day of November, 1866, without having procured a divorce from Boswell, she married Thomas Cooper, in Vigo county, in this State, and they lived together, in said county, as husband and wife, until his death in May, 1881; that during this marriage George and Milly Cooper, two of the appellees, were born to them, and that the other appellees are children of the decedent by a former marriage; that the property in dispute,

which was accumulated by them, belonged to the decedent at the time of his death, and was worth from \$1,500 to \$2,000; that from the time Boswell abandoned the appellant until the trial he had never been heard of or from, unless he returned in 1868 or 1869. This is the disputed question of fact, and the only dispute in the case. If he then returned, of course he was living when the appellant was married to Cooper, and such marriage was void. If he did not return, he has never been heard of, and the presumption is that he was dead when such marriage was solemnized. It is true that the law does not, as a general rule, raise a presumption of death until a party has been absent and unheard of for seven years; but when such time elapses such presumption arises. This is not a presumption that death occurred at the expiration of such time, but that it occurred at some time. At what time may be determined by other circumstances. Until the expiration of such time the law, in such case as this, presumes the party in life; but this presumption may be controlled by the presumption of innocence, and thus the date of death, in the absence of evidence to the contrary, may be fixed at a period of time less than seven years after the disappearance of the party. In 1 Bishop Marriage & Divorce, section 453, it is said, that "If a married partner has been absent and unheard of less than seven years, then the other marries, the law makes no absolute decision between the two conflicting presumptions of innocence and of life, but in a general way prefers the presumption of innocence, making the second marriage good." This proposition seems well supported by authority. See cases cited, and *Blanchard v. Lambert*, 43 Iowa, 228 (22 Am. R. 245), and authorities there cited.

In the same work, at section 456, it is said, that if, when suit is brought, more than seven years have elapsed since the absent person was last heard of, he is presumed to be dead, and that it is not "pressing the presumption of innocence very far to place the time of the death near that of the disap-

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pearance, instead of leaving it to vibrate in uncertainty between such disappearance and the end of the seven years."

In this case the trial occurred nearly twenty years after Boswell's disappearance, and, on the assumption that he has not since been heard of, the law presumes that he is dead, and that his death occurred before the appellant's marriage to Thomas Cooper. This being the presumption, it was incumbent on the appellees to remove it, and this they attempted to do by proving that Boswell returned in 1868 or 1869. For this purpose they called a Mrs. Purdy, who testified, substantially, that about the time named a stranger came to the house of Thomas Cooper, near where the witness resided, had a personal altercation with him which resulted in blows, and within a day or two thereafter left town, and that she had never heard of him since; that the appellant, on the same day and several times thereafter, told her that this man was her first husband. The appellant was called as a witness, admitted the difficulty between this man and Thomas Cooper, but denied that she had stated to Mrs. Purdy that this man was her first husband, and testified that he was not, but was a stranger to her. This was the only testimony upon the only disputed question of fact in the case, and the appellant insists that the finding was wrong.

The appellant's marriage with Thomas Cooper was solemnized in this State, in accordance with our laws, and the parties lived as husband and wife, where they were married, until the death of Thomas Cooper.

This marriage was valid, unless Boswell was living at the time it was solemnized. No witness deposed to such fact. It was not necessary. It was enough to prove its illegality by an admission that he was living at a time subsequent to this marriage. If such admission was made, it was sufficient to establish such fact. The facts that the parties were married in this State, according to the formalities of our law; that they thereafter, during the lifetime of Thomas Cooper, lived here as husband and wife; that they raised a family of children;

that the admission of appellant was made many years before it was detailed upon the witness stand; that the appellant denied it, and testified that such person was not Boswell; that the highest good of appellant, her children, and the community generally, renders it proper to indulge every reasonable presumption in favor of this marriage, were matters to be considered in determining whether or not Boswell was living when this marriage was solemnized. They were not, however, conclusive that he was not, and the admission was some evidence that he was, then living. As this admission, if believed, was sufficient to establish the fact, there was some evidence to support the finding, and in such case the general rule of this court is not to disturb a finding upon the mere weight of evidence. This rule, however, is based upon the assumption that the court has considered and passed upon all the evidence admitted, and, in the absence of anything in the record to the contrary, this is the presumption. If then this case is within the general rule, we can not disturb the finding; but the case is peculiar, and presents a question that has not heretofore arisen. When the appellant was offered as a witness, the appellees objected to her testifying, on the ground that this action is by and against heirs, founded on a demand against an ancestor, the object of which is to affect the land of such ancestor, and insisted that she was not competent to testify to anything that occurred prior to the death of Thomas Cooper. The court admitted her testimony, "saying, that inasmuch as the action was not on trial before a jury, but before the court, he would hear all the evidence that was offered; but saying further, that if the case was on trial before a jury he would not allow the plaintiff to testify."

The act of March 11th, 1867, upon which the appellees relied in support of their objection, provides: "That in all suits by or against heirs, founded on a contract with, or demand against, the ancestor, the object of which is to obtain title to, or possession of, land or other property of such ancestor, or to reach or affect the same in any way, neither party

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shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor."

This statute, if applicable, is broad enough to exclude the appellant; but this cause was tried after the statutes of 1881 went into force. Section 500 of R. S. 1881 provides, that "If any witness shall, on behalf of * * * heirs, testify to any conversation or admission of a party to the suit, * * * as having been had or made in the absence of the deceased; then the party against whom such evidence is adduced, * * * shall be competent to testify concerning the same matter."

As it does not appear that the admissions of the appellant were made in the presence of the decedent, she was clearly competent to testify concerning them, and, being competent, it was the duty of the court to thus consider her testimony. Whether it was considered we can not determine, but the announcement of the court when it was received, that if the cause was on trial before a jury the court would not permit her to testify, compels the conviction that the court regarded her as an incompetent witness, and, thus regarded, the court would not consider her testimony. It can not be that the court would consider and weigh testimony which, in its opinion, should not be submitted to a jury were the cause being tried by a jury, and since the opinion was entertained that the testimony was improper, it must be that the court reached its conclusion by disregarding it. We are somewhat strengthened in this conclusion by the fact that the appellees are at a loss to know whether the court, though the testimony was heard, excluded it or disbelieved it. They say that the court either disbelieved it or excluded it, and if it were excluded, the court did right, because the appellant was not a competent witness. This testimony, if believed, was abundantly sufficient to overthrow any case made by the appellees, and the court had no right to exclude her as a witness or to disregard her testimony if believed. Whether the court disregarded her testimony because incompetent, we can not say; but, however this may be, we are satisfied that this cause was tried upon the theory

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that the appellant was an incompetent witness, and this fact itself did her injustice. She is entitled to a trial upon the theory that she is a competent witness, and has the legal right to have her testimony thus considered. Its credibility is another thing. The law authorizing her to testify had gone into force but a short time before the trial, and probably escaped the attention of the court. The facts disclosed by the bill of exceptions take this case out of the general rule above mentioned; and, for the reasons given, we think a new trial should be granted. For the error in refusing it, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees Thomas and Chauncey Cooper's costs, with instructions to grant a new trial.

 No. 9994.
KEEPFER v. FORCE.

REVIEW OF JUDGMENT.—*Appeal.*—Where, in a proceeding to review a judgment for error of law, the judgment is reversed, an appeal from such judgment of reversal lies to the Supreme Court.

PLEADING.—*General and Special Averments.*—*Complaint to Quiet Title.*—A complaint to quiet title, which avers generally that the plaintiff is seized in fee simple, and then proceeds to set forth the facts which constitute his title, is bad on demurrer, if the facts so stated do not show title in him.

SAME.—*Tax Title.*—An averment in a complaint in an action to quiet title to real estate, that the plaintiff "claims title by a tax deed and sale by the county auditor of P. county (where the lands are), which deed is recorded," etc., is insufficient to show title in him.

TAX DEED.—*Description.*—*Mistake.*—*Reformation.*—A deed to a purchaser for taxes which, by mistake of the county auditor, erroneously describes the land, can not be reformed by suit.

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SAME.—*County*.—Where section, township and range are given by numbers, in a deed of lands, it is not necessary that the county where the lands are situated should also be given.

From the Pulaski Circuit Court.

N. L. Agnew and *J. C. Nye*, for appellant.

W. Spangler, for appellee.

FRANKLIN, C.—This is an action by appellee to review a judgment obtained by appellant against appellee.

A demurrer to the complaint was overruled, and judgment of review rendered, setting aside the former judgment. The errors assigned are the overruling of the demurrer to the complaint for review, and rendering judgment for appellee.

The complaint for review contains numerous alleged errors as occurring at the original trial and proceedings therein, but none of them appear to have been excepted to or reserved, except the overruling of the demurrer to the original complaint; and that presents the only question of error properly before us, or that has been discussed by counsel.

As a preliminary question, appellee's counsel contends that on a complaint to review, where the plaintiff is successful, an appeal to this court does not lie; that the effect of the judgment of review is simply to grant a new trial, and the original cause stands for trial again as though no trial had been had; that the proceedings therein, if tested in this court, must come up with an appeal from a final determination of the new trial of the original cause; and, in support of this position, we have been referred to the cases of *Richardson v. Howk*, 45 Ind. 451, and *Leech v. Perry*, 77 Ind. 422. Neither of these cases supports appellee's position. In both cases the appeals were entertained and passed upon. It is said in the latter case that "It is not the purpose of the judgment in the proceedings to review, to finally dispose of the action reviewed. It reverses and sets aside the judgment in the original action, just as would a judgment of reversal in this court, leaving the action to proceed as if no trial had taken place." And the court

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further said: "The issue tendered by the appellant's demurrer was one of law, and its determination ended the proceedings to review, unless the appellant desired to put in an answer." But in the case of *Brown v. Keyser*, 53 Ind. 85, this question was expressly decided against appellee's position. The court held that a judgment in a proceeding to review a former judgment, either granting or refusing the review, puts an end to the action for a review, and is a judgment from which an appeal will lie to the Supreme Court. We think this case settles the question, and that an appeal in such cases can be taken to this court.

The principal question in controversy is, did the court below err in overruling the demurrer to the complaint in the original suit? The complaint reads as follows: "Said plaintiff, for amended complaint herein says, that he is the owner in fee simple of the following described real estate in Pulaski county, in the State of Indiana, to wit: The north half of the northwest quarter of section eleven (11), township thirty-one (31) north, range two (2) west; and that he is in possession of said real estate; that he claims his title by, through and in virtue of a tax deed and sale from and by the county auditor of Pulaski county, Indiana; which said deed is recorded in the recorder's office of Pulaski county, in record No. 1, page 320; and was recorded within forty-five days from the date thereof; that, by a mistake of said county auditor, the county and State in which said land is situated were omitted in said deed; and plaintiff avers that the land described and conveyed in said deed is situated in the said county of Pulaski and State of Indiana, which is more fully shown by the tax duplicate on file in said auditor's office for the year 1873; which said tax duplicate is referred to in said deed as containing a description of the land conveyed in said deed; that the defendant herein claims some interest in said real estate adverse to the title of this plaintiff, which said claim of title is unfounded, and defendant is made a defendant herein to answer as to his interest in said real estate. Plaintiff avers

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that, by reason of the premises therein a cloud upon his title to said real estate exists. Wherefore he prays the court to reform the said mistake in said deed, so that said land may be shown to be situated in the county of Pulaski and State of Indiana; and that his title be quieted and set at rest, and that the defendant be forever enjoined and estopped from setting up any claim to said lands, and for all other proper relief."

The court only rendered judgment quieting title to the lands, but, on the complaint to review, held the original complaint insufficient, and set aside the judgment.

If appellant, in his original complaint, after averring that he was the owner in fee simple, and in possession, of the land in controversy, and that the defendant claimed some interest therein, which was a cloud upon his title, had stopped with such averments, and prayed that his title be quieted, he would doubtless have stated a good cause of action; but, not content with such averments, he undertook to state the facts constituting his ownership and title, and upon which said general averments were based; and, having undertaken this, in order to make a good complaint he must state facts enough to constitute a good title. The rule that the special facts may be disregarded as surplusage, and the general averments alone considered, does not apply where what is stated generally is made to depend upon the special facts stated. In such cases, the special facts operate as a limitation upon the general averments, and the general averments must be regarded as conclusions from the special facts stated. We think the complaint in this case falls under this class of pleading.

A statute which goes to divest the title of the citizen to real estate, although it may be for the public good, must be strictly construed.

A party setting up title under a sale for taxes must show that every provision of the statute under which the sale was made has been complied with. *Ellis v. Kenyon*, 25 Ind. 134. A claimant under a tax title must prove that all the re-

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quirements of the statute have been complied with. *Wiggins v. Holley*, 11 Ind. 2.

Notwithstanding the provision of the statute, R. S. 1824, p. 344, sec. 12, that "such conveyance shall be conclusive evidence, that the sale was regular according to the provisions of this act." "The steps necessary to vest the *power of sale* in the collector, it seems, must be proven." *Wilson v. Lemon*, 23 Ind. 433. *Parker v. Smith*, 4 Blackf. 70.

In the case of *McEntire v. Brown*, 28 Ind. 347, it is stated that "The deed itself was the only evidence offered of the facts necessary to authorize a sale for taxes, and it was utterly silent as to many of those, the proof of which has been repeatedly held by this court, and by all courts, to be essential to maintain the validity of such a sale. But the court instructed the jury that the tax deed 'is presumed to be legal, so far as is shown by the evidence in this cause.' This was manifestly incorrect, and in conflict with all the authorities."

In the case of *Steeple v. Downing*, 60 Ind. 478, 501, this court said: "We take it to be clear, that the provision that the conveyance shall vest in the grantee an absolute estate in fee simple, has reference to the quantity of estate to be conveyed by such deed, and can not be taken to mean that such estate shall vest in the grantee unless the law has been complied with, in the steps required to be taken to authorize the sale, and in the making of the sale. The deed is not conclusive or *prima facie* evidence of anything but the facts recited therein. Hence, every fact necessary to constitute a valid sale, not recited in the deed, must be otherwise shown, or no title will be conferred by the deed." And the cases of *Gavin v. Shuman*, 23 Ind. 32, and *Ellis v. Kenyon*, 25 Ind. 134, are referred to in support thereof.

The complaint under consideration does not state the date of the sale or under what statute the deed was made; it only refers to the duplicate of 1873, containing a description of the land sold.

The 224th section of the act of December 21st, 1872, 1 R.

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S. 1876, p. 123, provides that "such deed shall be conclusive evidence of the truth of all the facts therein recited, with the exception of the fact that payment of the taxes for which the lands named therein, were sold had not been made by or on behalf of the proper owner of such lands in due time, and to the proper officer; of which last named fact such deed shall be held as *prima facie* evidence, and no more." This statute is similar to the one under which the decision was made in the case of *Steeple v. Downing, supra*.

The deed is not made a part of the complaint or record, and we can not tell what facts are recited in it so as to make them conclusive or *prima facie* evidence, or what necessary facts are omitted in the deed that are required to be shown otherwise than by the deed. The mere allegation of holding a tax deed is not a sufficient averment that the land is owned thereby in fee simple. This court has held that a tax deed alone, which does not recite that there was no personal property, is not sufficient without further proof. *Woolen v. Rockafeller*, 81 Ind. 208; *Smith v. Kyler*, 74 Ind. 575.

As a compliance with the provisions of the statute must be shown in order to recover the land on a tax deed, and that a deed alone that does not recite such compliance is inadmissible in evidence unless such compliance is otherwise proven, a complaint based upon a tax deed, without averring a compliance with the necessary provisions of the statute, or that the deed recites such compliance, and the deed is not made a part of the complaint, is insufficient to show a good title that ought to be quieted.

As to that part of the complaint which seeks a reformation of the deed, we think it is also insufficient. There was no mutual mistake alleged that could be corrected; or that the deed was anything different from what the grantee knew it was at the time he received it. *Nelson v. Davis*, 40 Ind. 366.

The reformation of an instrument is an equitable proceeding, and in this no equity is shown by the complaint. It does not show that the land was subject to taxation; that it had

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been assessed; that the tax had not been paid; that it was returned delinquent; that appellant had paid anything for it, or any other fact creating an equity that would require a reformation of the deed.

A tax sale partakes of the nature of a judicial sale. It is a sale made by operation of law, in which the owner of the land does not participate, and in which there can be no mutual mistake between him and the purchaser. Judicial sales, as a general proposition, are not subject to correction by re-forming the deed. *Rogers v. Abbott*, 37 Ind. 138; *Miller v. Kolb*, 47 Ind. 220. And the reasons alleged show no necessity for the reformation. If the land is in this State, the town and range being given in the deed fixes the land in the proper county. The facts that the auditor of the county sold the land for taxes, and executed the deed, raise a sufficient presumption that the land is in this State. See the case of *Dutch v. Boyd*, 81 Ind. 146, and authorities cited.

No question is made as to recovering back the money paid on the taxes, or to have it declared a lien upon the land.

We think the complaint in the original cause is not sufficient to maintain the action; that there is no error in the overruling of the demurrer to the complaint for a review of the judgment. The judgment in the proceedings to review ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below in proceedings to review be and it is in all things affirmed, with costs.

No. 10,315.

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MARRIED WOMAN.—*Infancy.*—*Coverture.*—*Conveyance.*—*Possession of Real Estate.*—The conveyance by an infant married woman and her husband of her real estate is voidable as to her; but, where such a conveyance was

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executed prior to 1847, it operates as an absolute transfer of the husband's interest in the land, and entitles the grantee and his heirs to the possession of the land during the joint lives of the grantors.

SAME.—Action to Quiet Title.—Disaffirmance.—Where, at the time of the disaffirmance by the wife of such a conveyance, the grantors were alive, an action to ascertain and quiet her title is the only appropriate remedy of the wife.

SAME.—Limitation of Action.—After disaffirmance such action may be commenced at any time during the continuance of the estate in the grantee or his heirs.

SAME.—Double Disability.—Reasonable Time.—The conveyance of an infant married woman may be disaffirmed by her within a reasonable time after the removal of her double disability.

SAME.—Statute of Limitations.—The right to disaffirm after removal of disability must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed.

SAME.—Commencement of Action.—It is the disaffirmance which avoids the deed of an infant, and not the bringing of the action to recover the land conveyed.

SAME.—Case Stated.—Lapse of Thirty-Three Years Not a Bar.—Where a woman, married in 1844 at sixteen, within a year joined her husband in the conveyance of her land, the consideration being received by him, but in 1881, her husband joining, gave notice of her disaffirmance of the deed, she is not estopped by any statute of limitations from bringing an action to determine and quiet her title to the land so conveyed. In such case the disaffirmance was within a reasonable time.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, H. Dailey and W. N. Pickerill, for appellant.

D. Moss, W. Neal, R. R. Stephenson and W. S. Christian, for appellees.

MORRIS, C.—This suit, which is in the nature of a suit in equity, was brought by the appellant against the appellees, to ascertain her interest in, and quiet her title to, certain real estate situated in the county of Hamilton, and State of Indiana.

The complaint states that the appellant was, on the 24th day of July, 1844, married to the appellee John F. Sims, and that they have continued to be ever since husband and wife; that prior to their marriage she was the owner in fee simple of the west half of the northwest quarter of section 7, township 19

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north, of range 5 east, in said county and State; that, on the day and year aforesaid, the plaintiff and her said husband executed to Henry Bardoner a deed purporting to convey to him said real estate; that the appellee Peter Bardoner is the heir of said Henry Bardoner, who died intestate, and as such claims title to said real estate; that at the time the appellant and the appellee Sims executed said deed to said Henry Bardoner she was a minor, of the age of sixteen years only, which was at the time known to their grantee; that, when she arrived at the age of twenty-one years, she desired to disaffirm her said deed on account of her infancy at the time of the making of the same, but that her husband, John F. Sims, would not permit her to do so; that he was many years her senior, had great influence and control over her will, forbade her disaffirming said deed, refused to join her in giving notice of her desire to do so, and would not allow her to take any steps for the recovery of said land, he having received the consideration paid for said land, which was \$2.50 per acre, and appropriated the same to his own use without the appellant's consent; that he continuously refused to allow the plaintiff to take any steps to recover said land, or to give any notice to the grantee or his heir, the appellee Peter Bardoner, of her intention to disaffirm said deed, until the — day of March, 1881, when he joined her in serving a notice upon the appellee Peter Bardoner (said Henry Bardoner having previously died intestate, as aforesaid), of their disaffirmance of said deed. It is averred that the appellee Bardoner denies that the appellant has, or had, any right to disaffirm said deed; and denies that she has any interest in or title to said lands, claiming and giving it out in speeches that he is the absolute owner in fee of the same.

The prayer is, that the appellant's title to said land may be determined and quieted; that said deed, as to her, may be declared void, and for other proper relief.

The appellee Bardoner demurred to said complaint, for the want of sufficient facts. The court sustained the demurrer.

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The appellant refused to plead further, and final judgment was rendered upon the demurrer in favor of the appellees.

The sustaining of the demurrer to the complaint is assigned as error.

The deed executed by the appellant and her husband to Henry Bardoner operated as an absolute transfer to him and his heirs of the interest of the husband in said land, and entitled the grantee and his heirs to the possession of the land during the joint lives of the appellant and her husband. It follows, they being alive at the commencement of this suit, that the appellee Bardoner was then rightfully in possession of said land. This being so, the only suit which the appellant could have instituted at any time was a suit to ascertain her interest in, and quiet whatever title, if any, she might be held to have to, said land. Assuming that the deed executed by the appellant had been so disaffirmed by her before the commencement of this suit, as to render it inoperative as to her, the time elapsed from the execution of the deed until the commencement of the suit would not bar the action; such a suit, under the circumstances stated, might be brought at any time during the continuance of the estate of Henry Bardoner, or his heirs, as the grantee of the appellant's husband.

It follows, therefore, that at the time the appellant attempted to disaffirm said deed, her rights, if she had any, were not barred by any statute of limitations.

The deed executed by the appellant and her husband to Henry Bardoner was not void; the deed passed the title, and was voidable only. The deed passed to the grantee the title of the appellant, subject to be divested by her subsequent disaffirmance of it within the proper time. Though the appellant might, perhaps, at any time after attaining her majority, and after the legislation of 1847, notwithstanding her continued coverture, have so disaffirmed the deed as to have enabled her to maintain this action, the question is, did she, upon the facts stated in the complaint, disaffirm the deed within the time allowed by law?

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As to what constitutes a reasonable time for avoiding a contract executed by an infant, the authorities are not quite agreed. In equity this may be done during infancy, so far, at least, as to enable the infant to recover the income of the estate conveyed. In the case of *Drake v. Ramsay*, 5 Ohio, 251, it was held that the deed of an infant may be disaffirmed at any time, so long as an action of ejectment is not barred by the statute of limitations. In the case of *Wallace v. Latham*, 52 Miss. 291, it was held that the more general rule upon the subject is that an infant executing a deed has, until such time as will complete the bar of the statute of limitations after majority, to disaffirm it. Tyler on Infancy and Coverture says, p. 71: "In case of coverture and the like, the deed of an infant may be disaffirmed within a reasonable time after the disability ceases, unless the party may have done something after age, and while the disability continued, to confirm it." He refers to *Sims v. Everhardt*, 102 U. S. 300. In the case of *Bigelow v. Kinney*, 3 Vt. 353 (21 Am. Dec. 589), it was held that in a case where all the equities were against the act of disaffirmance, the infant was bound by his voidable contracts, unless disaffirmed within a reasonable time, and that eleven years after majority was not a reasonable time.

What constitutes the reasonable time within which a person who has executed a deed during infancy shall disaffirm it, depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period. It is the disaffirmance which avoids the deed of the infant, and not the bringing of the action to recover the land conveyed.

In the case of *Miles v. Lingerian*, 24 Ind. 385, it was held that the deed of an infant *feme covert* might be avoided within a reasonable time after she became discoverd, she having done nothing during coverture in affirmance of the conveyance. The court says:

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“Under our present statute the wife may bring her action in regard to her own estate as though she were a *feme sole*; still our Legislature has seen proper to continue the protection formerly accorded to her as a *feme covert*, although, as to her power to disaffirm her contracts made during minority, her legal disability has been removed. She has the legal power to disaffirm her contracts made during infancy, and to bring her action without the assent, and even against the will, of her husband. But the Legislature has not required her to exercise that power during coverture. It might result, indeed, that the exercise of that power, without the consent of the husband, would impair the harmony of the marriage relation. The law, therefore, having empowered the wife to act, is still careful not to require such action as might, perhaps, imperil her domestic peace, in the effort to secure her property. We do not decide that there may not be circumstances under which, having the legal power to act, the neglect to do so would amount to a fraud upon third parties, and prevent any after disaffirmance of her conveyance. Nor do we decide that even her failure to act, under such circumstances, would be an affirmance of the deed, and pass from her a title, which our statute declares can only be divested by a conveyance in which her husband has united.”

It is intimated, though not decided, that the wife, having the power to disaffirm, may be required to do so if her failure would operate as a fraud upon others; but where she does nothing in affirmance of the deed, it is difficult to see how her mere silence, induced through the controlling influence of her husband, can be construed as a fraud, requiring her to exercise a right before the same has been barred by any statute.

In the case of *Doe v. Abernathy*, 7 Blackf. 442, after citing several conflicting cases upon the question as to whether an infant is, upon coming of age, bound to disaffirm a deed made during minority, within a reasonable time, or may do so at any time before the statute of limitations becomes a bar, the court declined to decide the question, but held that, in that

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case, the right to disaffirm, having been exercised within five years, was, under the circumstances of the case, exercised within a reasonable time. It is obvious that the court, in holding that the right to disaffirm had been exercised within a reasonable time, took into consideration the fact that the infant grantor had, at or about the time of her majority, become *covert*.

In the case of *Hartman v. Kendall*, 4 Ind. 403, Michael Robbins and Rebecca, his wife, who was then seventeen years of age, conveyed certain real estate to Hartman. It was unimproved when conveyed. In 1837 Rebecca attained her majority, and in that year her husband died. She remained a widow for ten years; lived in the near vicinity of the land. In 1847 she married Tubal Kendall, and she and her husband continued to live near the land until 1850, when they demanded dower in the land. Hartman had constantly and greatly improved the land. The question was, whether, under the circumstances, the acquiescence of Rebecca for thirteen years amounted to an affirmance of the deed. The court says:

“It” (avoidance) “must take place in this State within twenty years, or the statute of limitations will be a bar. May circumstances estop a party from asserting the right of avoidance even within that time, and, if so, what are they?” Again the court says: “In the case now before the court, there must be a decision as to the effect of thirteen years’ acquiescence, by a party living in the vicinity of the land, with full knowledge of her rights (for where the facts are known all are bound to know the law arising upon them) and with easy opportunity to notify the tenant in possession of an intention to disaffirm, and while improvements were being made by that tenant in the belief that his title was complete; and we think that effect is to preclude the grantor from exercising the right to avoid her deed.”

It is evident that the conclusion reached was the result of the peculiar facts and circumstances of the case. But for

these circumstances, which operated as an estoppel, the conclusion, it may be fairly inferred, would have been different.

The only question decided in the case of *Law v. Long*, 41 Ind. 586, and the only one upon which it can be regarded as authority, is, must a party disaffirm a deed executed during minority before bringing his action to recover the land? This question was decided in the affirmative. Other questions are discussed in the case, but it was decided upon that above stated. The case of *Miles v. Lingerman*, 24 Ind. 385, is alluded to with seeming approval, certainly without the slightest intimation of disapproval.

In the case of *Scranton v. Stewart*, 52 Ind. 68, the appellant sought to recover the possession of the land in dispute, upon the ground that when she and her husband conveyed it, she was an infant and a *feme covert*. Notice of disaffirmance had been given within five years after the grantor became of age, and the court held it to be within a reasonable time. The judge who prepared the opinion in that case says, that if it was held in *Miles v. Lingerman*, *supra*, that the law did not require a married woman to disaffirm her deed made when an infant, and while under coverture, during coverture, it is not the law. He further says, that in *Law v. Long*, *supra*, "it was said that the authorities all agree that the contract must be disaffirmed within 'a reasonable time.' * An examination of the above authorities will show that the time required ranges from one to twenty years, according to the peculiar circumstances of each case and the views of different judges and writers." If we substitute the words "until barred by the statute of limitations" for the words "twenty years" in the above statement, it may perhaps be regarded as a correct statement of the law.

Schouler, in his recent work on Domestic Relations, p. 585, says: "Where land had been sold by an infant it was said in a Connecticut case, years ago, the period of acquiescence being thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time; and similar *dicta* may be

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found in other courts; but there seems to be no doubt upon the decided cases, that mere acquiescence is no confirmation of a sale of lands unless it has been prolonged for the statutory period of limitation; and that an avoidance may be made any time before the statute has barred an entry."

The above is, we think, an accurate statement of the general rule upon the subject. It was so held in *Hartman v. Kendall*, *supra*. If the party entitled to disaffirm stands by and sees improvements about to be made or money about to be expended upon the land, he must act promptly in asserting his rights; if he does not he may be estopped, even in one year. But if he does not stand by, if he does nothing in affirmance of the deed and is not called upon by peculiar circumstances to assert his rights, he may disaffirm at any time before his right of entry is barred.

It is true that lapse of time, short of the period of limitation, with slight circumstances, has been held sufficient to sustain an infant's deed; but these cases confirm the general rule. In Illinois and some other states the question is regulated by statute.

The recent case of *Sims v. Everhardt*, 102 U. S. 300, decided in 1879, is in point. Ann M. Sims was married to John B. Sims, July 14th, 1844. She was born September 25th, 1828. Her father, April 3d, 1845, conveyed to her the land in dispute in fee, and, on the 28th day of May, 1847, she and her husband conveyed the land to Magdalena Everhardt. Mrs. Everhardt went into immediate possession of the land, paid taxes and a mortgage on the property, and continued in possession, making improvements, until 1871, when she died. The defendants to the suit were her devisees. At the time the deed was made Mrs. Sims stated in writing that she was of age; that she made the statement to induce Mrs. Everhardt to purchase the land. There was evidence in the case that she had been badly treated by her husband before the deed was made; that she was afraid of him; that a look from him would make her do almost anything. On the 14th of

February, 1870, she obtained a divorce from her husband, for his fault. In April following she disaffirmed her deed to Mrs. Everhardt.

Justice STRONG, who prepared the opinion in the case, reviewed the decisions of this court upon the subject, and concludes, correctly we think, that they do not establish the rule that a married woman who had executed a deed with her husband when an infant, conveying her real estate, must disaffirm the same within a reasonable time after attaining her majority. In speaking of the case of *Scranton v. Stewart*, 52 Ind. 68, the court says: "The Supreme Court held that her disaffirmance was in time. It was all the case required. But the judge went on to declare that a married woman who has made a deed of her lands during her infancy and coverture must disaffirm it within a reasonable time after she arrives at age, notwithstanding her coverture, and that the fact of the continued coverture would not extend the time for the disaffirmance. All this was *obiter*." The court approves the rule as stated in *Miles v. Lingerian*, *supra*.

The court further says: "When the deed was made, she," Mrs. Sims, "was laboring under a double disability,—infancy and coverture. Even if her deed and that of her husband had not conveyed his marital right to the possession and enjoyment of the land, she would have been under no obligation, imposed by the statute of limitations, to sue until both the disabilities had ceased; that is, until after 1870. It is an acknowledged rule that when there are two or more co-existing disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. 2 Sugden Vendors, 103, 482; *Mercer's Lessee v. Selden*, 1 How. 37."

The above rule seems to have been overlooked by BUSKIRK, C. J., in *Scranton v. Stewart*. It is not the tacking of one disability to another, but claiming, in accordance with the obvious meaning and spirit of the statute, the longer of two existing disabilities. How can it be said, that the removal of the less of two co-existing disabilities shall have the effect

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to terminate the greater? The joinder of the husband in the execution of the deed prevented the running of the statute of limitations, and no reason can be perceived why it should be held that her coverture is removed as to the disaffirmance of her deed. Bishop, in his work on Married Women, vol. 2, sec. 516, says: "If the infant is also a married woman, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended." *Dodd v. Benthal*, 4 Heisk. 601; *Matherson v. Davis*, 2 Cold. 443. Schouler (p. 589) agrees with Bishop.

In the case of *Drake v. Ramsay supra*, the court held that mere lapse of time would not of itself take away the right to disaffirm the deed of an infant, until his right of entry became barred by the statute of limitations. To the same effect are the following cases: *Cresinger v. Welch*, 15 Ohio, 156; *Irvine v. Irvine*, 9 Wal. 617; *Prout v. Wiley*, 28 Mich. 164.

In *Sims v. Everhardt, supra*, the Supreme Court held that Mrs. Sims, having done nothing in affirmance of her deed, and being under coverture and in fear of her husband during her marriage, had a right to disaffirm her deed within a reasonable time after her coverture ceased. The court rested its decision upon the peculiar circumstances of the case, but it is obvious, from the reasoning of the court, that it would have held, had the exigencies of the case required it, that she had, aside from these circumstances, a right to disaffirm after her coverture ceased.

It may be doubtful, under the law as it stood at the time when the deed in this case was made, whether the appellant had the power to effectually disaffirm her deed without the consent of her husband. We need not, however, decide this question. Nor need we decide that, generally, a married woman may disaffirm her deed, made during infancy, within a reasonable time after her coverture ceases. The question is, whether the appellant did disaffirm her deed within a reasonable time after she attained her majority. We say, in the

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language of Judge STRONG, that "What is a reasonable time is nowhere determined in such a manner as to furnish a rule applicable to all cases. The question must always be answered in view of the peculiar circumstances of each case." *State v. Plaisted*, 43 N. H. 413; *Jenkins v. Jenkins*, 12 Iowa, 195; *Stringer v. Northwestern M. L. Ins. Co.*, 82 Ind. 100.

It is said that the appellant has stood by for thirty-three years after becoming of age. This is a mistake. There is nothing in the complaint which shows, or tends to show, a standing by, in the legal sense of the words, on the part of the appellant. On the contrary, according to the allegations of the complaint, she is still under coverture. Her husband received the entire consideration for the land conveyed; she was under his control, and he refused to permit her to disaffirm her deed, although he knew she desired to do so; he had great influence over her and restrained her from disaffirming the deed until shortly before the commencement of the suit. She has done nothing in affirmance of the deed. Her grantee knew, at the time the deed was made, that she was an infant and a married woman, as did the appellee, who takes by descent from her grantee. Under these circumstances, though the deed was not disaffirmed until thirty-three years after the appellant had attained her majority, we think she acted within a reasonable time. If there was any standing by on the part of the appellant, if she knew that improvements were being made or that money was about to be expended upon the land, these facts, or any others tending to estop the appellant from exercising her right to disaffirm, should be brought forward by answer. They do not appear in the complaint. We think the court erred in sustaining the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

Conover v. The State.

No. 10,596.

CONOVER v. THE STATE.

88 99
156 40**CRIMINAL LAW.—*Plea of Guilty.—Withdrawal of Plea.—Discretion of Court.—***

Where it appears that the defendant, on arraignment upon an indictment charging him with a felony, voluntarily enters as his plea to such indictment, that he is guilty as therein charged, his subsequent application to the court for leave to withdraw such plea of guilty is addressed to the sound discretion of the court below; and, unless there appears an abuse of such discretion, the Supreme Court will not interfere with its exercise.

SAME.—*Motion for Leave to Withdraw Plea.—Oral and Written Evidence.—*

Upon the hearing of the motion for leave to withdraw a former plea, it is competent for the court to hear such evidence, oral or written, as either party may offer; and if affidavits are offered by either party, the opposite party may, with permission of the court, orally cross-examine the affiants, if they can be produced at the hearing.

From the Marion Criminal Court.

J. Buchanan, for appellant.

F. T. Hord, Attorney General, *W. T. Brown*, Prosecuting Attorney, and *C. F. Robbins*, for the State.

Howk, J.—The indictment against the appellant in this case contained two counts. In the first count it was charged in substance, that the appellant, on the 4th day of July, 1882, at and in the county of Marion, Indiana, did then and there unlawfully and feloniously steal, take and carry away two United States legal tender treasury notes, each of the denomination and value of \$5, two United States national bank notes, each of the denomination and value of \$5, and one United States legal tender treasury note of the denomination and value of \$2, of the moneys and personal goods and chattels of one Robert Jenkins.

In the second count of the indictment, the appellant was charged with the offence of embezzlement, and the charge is manifestly predicated on the same transaction on which the charge in the first count is founded.

The indictment was returned into open court, on the 15th

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day of July, 1882. On the same day the record shows that the following proceedings were had in the cause, to wit:

“Now comes John B. Elam, prosecuting the pleas of the State of Indiana, and comes also the defendant herein, William Conover, in his own proper person, and being duly arraigned, for plea to the foregoing indictment, says that he is guilty as charged therein. And said defendant being under the age of twenty-one years, judgment is now withheld herein, and said defendant is allowed to go during good behavior.”

Afterwards, on the 17th day of October, 1882, the appellant appeared in person and by counsel, and moved the court for leave to withdraw his former plea of guilty entered herein; and the State filed an affidavit in opposition to such motion. The matters arising under the motion having been heard and considered, the court afterwards, on October 24th, 1882, overruled the motion; to which ruling the appellant at the time excepted. He then moved the court in writing, in arrest of judgment; which motion was also overruled, and his exception was entered to this decision. The court then rendered judgment against the appellant, upon his former plea of guilty, that he make his fine to the State of Indiana in the sum of \$1, and be imprisoned in the State's prison for the period of one year, and pay the costs of this prosecution.

In this court the following errors are assigned by the appellant:

1. The court erred in overruling his motion for leave to withdraw his plea of guilty;

2. The court erred in permitting the State, over his objections, to introduce evidence, oral or otherwise, upon his motion for leave to withdraw his plea of guilty, upon the question of partnership between him and Robert Jenkins;

3. The court erred in permitting the State to call and orally cross-examine the parties whose affidavits had been filed by him in support of his motion for leave to withdraw his plea of guilty; and,

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4. The court erred in overruling his motion in arrest of judgment.

The appellant's motion for leave to withdraw his plea of guilty was in writing, and showed for cause that he was young and inexperienced in legal proceedings, and did not enter the plea nor authorize the same to be done; that he was not guilty, as charged in the indictment; that he was a partner of said Robert Jenkins, and had only partnership money in his possession; and that he never had any of Robert Jenkins' money in his possession.

The appellant's motion was addressed to the sound discretion of the criminal court, and, unless the record showed a very clear abuse of such discretion, this court would not be authorized, we think, to review or reverse the decision below on such motion. The criminal court heard evidence in regard to the matters of fact involved in the motion, and while the evidence was conflicting, we can not say that the court erred in overruling the motion; nor can we say that the court erred in permitting the State to introduce evidence on any of the matters presented by the motion. If the appellant introduced evidence in regard to those matters, it would hardly have been proper or fair to have excluded the State's evidence in relation thereto. The appellant complains of the action of the court in permitting the State to call and cross-examine orally the parties who had made and filed affidavits in support of his motion. We see no error in this action of the court, and, indeed, the practice was approved by this court in *Beard v. State*, 54 Ind. 413.

In section 1748, R. S. 1881, it is provided that an indictment for larceny may contain a count for the embezzlement of the same goods or property, and that the court or jury may find the person guilty of either of the offences charged. In this case, as we have seen, the appellant's plea to the indictment was, that he was "guilty as charged therein," that is, as charged in both counts of the indictment. It is difficult to see how he could be guilty of both the felonious taking and

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embezzlement of the same money ; but, by his plea, he has said that he was guilty of both offences. The appellant is in no condition to complain in this court of the effect of his plea, nor can we say that he was injured thereby. The court assessed his punishment at imprisonment in the State's prison for the shortest period of time prescribed by law for either of the two offences charged in the indictment.

It may be that the appellant was not guilty of either of the offences charged against him, and that he is suffering an unjust punishment, but we can not say so from the record before us ; nor can we, in the condition of the record, say that there is any such error in the proceedings as would authorize or require the reversal of the judgment below.

The indictment is sufficient, and the court committed no error in overruling the motion in arrest of judgment.

The judgment is affirmed, with costs.

No. 9848.

THARP v. PARKER ET AL.

PROMISSORY NOTE.—*Principal and Surety.*—*Answer.*—*Extension of Time.*—

Notice.—Where suretyship is not apparent on the face of a note, a surety is not released from liability thereon by an extension of the time of payment thereof, unless the payee has knowledge of the suretyship ; and an answer setting up such a defence in a suit must aver such notice.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

L. M. Campbell, for appellees.

BICKNELL, C. C.—The appellant brought this action against the appellees and William J. Smith, upon a promissory note of which the following is a copy :

"\$226.88.

Dec. 27th, 1867.

"Twelve months after date we, the subscribers, of Hend.

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county, of Brownsburg and State of Indiana, promise to pay to the order of Allen Tharp, two hundred and twenty-six $\frac{88}{100}$ dollars, value received, without any relief from valuation or appraisement laws."

(Signed)

" WILLIAM J. SMITH.

" J. W. PARKER & B. T. SMITH.

" LEWIS S. HUNTER."

William J. Smith was not found. The other defendants answered as follows: "The defendants, John W. Parker, Benjamin T. Smith and Lewis S. Hunter jointly and separately answer the complaint of plaintiff, and say it is true they did, on the 27th day of December, 1867, together with one William J. Smith, execute their note to plaintiff, as set out in said complaint, but they say the plaintiff now has no cause of action against these defendants, or any one of them, because they say that said note was executed by William J. Smith as principal, and these defendants as sureties; and that the sole consideration for said note was the loan of \$200 by plaintiff to the said William J. Smith for one year from said date, and that the excess over said sum, to wit, \$26.38, was written and included in said note as interest, at the rate of over thirteen per cent. per annum, and that, after said note became due, the plaintiff did, without the knowledge, consent or approval of these defendants, or any of them, make and enter into a new contract with the principal maker of said note, to wit, the said William J. Smith, and did agree to extend the time of payment of said note beyond the date when the same became due, for different periods of time, from year to year, receiving, in consideration for the extension of said time of payment, interest in advance, and at a greater rate than was allowed by law. Wherefore," etc.

A demurrer to this answer was overruled. The plaintiff replied by a general denial and specially; the issues were tried by the court, who found for the defendants. The plaintiff's motion for a new trial, alleging that the finding was not sustained by sufficient evidence, and was contrary to law, was overruled; judgment was rendered on the finding. The plain-

tiff appealed. He assigns as errors the overruling of the demurrer to the answer and the overruling of the motion for a new trial.

The suretyship was not apparent in the note. All the makers of the note appeared to be principals, jointly liable and equally liable. In such a case the defence of suretyship and discharge by extension of time is not available, unless the holder of the note has knowledge of the suretyship.

The answer in this case fails to aver that the plaintiff, at the date of the alleged new contract to extend the time, had knowledge of the alleged suretyship. It was, therefore, insufficient; the court erred in overruling the demurrer to it. *Davenport v. King*, 63 Ind. 64; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86 (33 Am. R. 76).

As the judgment must be reversed for this error, we need not consider the motion for a new trial.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to sustain the demurrer to the answer.

No. 10,209.

PUETT ET AL. v. BEARD.

PLEADING.—*Defects Cured by Verdict.*—Where a complaint is defective, but contains such facts as will enable the court to remedy the defect by reasonable intendment, it will be held good after verdict.

EVIDENCE.—*Assault and Battery.*—*Res Gestæ.*—*Declarations.*—*Admissions.*—The declarations of a plaintiff while lying on the floor where he had been thrown by the defendants, who were present and still pursuing their attack upon him, constitute part of the *res gestæ*, and, in a suit for the assault and battery, are admissible for the plaintiff. It was also competent as evidence of an admission by the defendants of the facts declared, if they remained silent.

86	104
127	288
86	104
134	611
135	48
86	104
137	25
86	104
142	167
86	104
147	957
86	104
163	372
86	104
164	429
86	104
165	676

Puett *et al.* v. Beard.

SAME.—Conversation.—When part of a conversation between parties is properly in evidence, the whole, together with the attending circumstances, including the remarks of others then made, are admissible, to enable the jury to interpret any admissions made on the occasion.

SAME.—During a trial before a justice of the peace, one who was testifying as a witness left the stand to engage, with others, in violence against J. B. This breach of the peace put an end to the trial. The witness then resumed his place and said to an attorney: "We are ready to go on with the trial." To which the attorney answered: "You and your crowd have nearly killed J. B., and we can not go on with the trial. You have disabled him so that we can't try the case now." To which no response was made.

Held, that this was proper evidence in a suit for the injury by J. B. against his assailants.

INSTRUCTIONS.—Practice.—Error.—The refusal to give instructions can present no question in the Supreme Court, unless the record shows affirmatively that they were asked in apt time, and that they were not embraced in other instructions actually given, which must appear by setting out all of the latter.

From the Montgomery Circuit Court.

W. H. Thompson and J. M. Thompson, for appellants.

A. D. Thomas, J. W. Shelton and J. R. Courtney, for appellee.

ELLIOTT, J.—The sufficiency of the complaint was not questioned in the trial court, but is here assailed by the assignment of errors.

There are many defects in a pleading which a verdict will cure, and that which the appellants suppose to exist in the appellee's complaint belongs to the class which a verdict cures. The defect supposed to exist is that the appellants' connection with the wrong constituting the cause of action is not properly averred. It may, perhaps, be true that there is some obscurity and confusion upon this point, but, however this may be, there are such facts stated as will enable the court, by reasonable and fair intendment, to remedy the supposed imperfection, and, when this can be done, the verdict so aids the pleading as to make it the duty of the court to uphold it. *Parker v. Clayton*, 72 Ind. 307; *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294.

Puett *et al.* v. Beard.

The appellee was permitted to prove declarations made by himself, in the presence of the appellants, while lying upon the floor where he had been thrown by their unlawful violence, and while he was still calling for assistance against their continuance of the illegal assault and battery committed upon him. The testimony was competent. It was competent as forming a part of the *res gestæ*, because no perceptible interval of time had elapsed between the assault of the appellants and the declarations of the appellee. It may, indeed, be fairly inferred that the former were still threatening the latter, and were still pursuing their unlawful purpose, although not then engaged in actually beating their adversary.

The evidence was competent upon another ground. It was an accusation against the appellants, and in their presence, and, if they had simply remained silent, the testimony would have been competent as evidence of an admission of the truth of the undenied accusation.

It is a familiar rule that where a part of a conversation relative to the subject under judicial investigation is admissible, all that forms part of that conversation, together with the circumstances surrounding the persons engaged in it, are competent to go to the jury, for the purpose of enabling them to assign the proper and just effect to the admissions made in the course of the conversation. The cries of the injured man brought men to his assistance. He made declarations which drew remarks from those who were drawn to the spot by his cries, and to these remarks the appellants made answers which were material admissions, and the transaction thus became so blended and interwoven as to constitute an indivisible unity.

The assault and battery, for which the action was brought, was committed at a trial before a justice of the peace, and after the combat had ended, and one of Beard's assailants had again taken his place on the witness stand, which he had left to engage in the attack on Beard, he said to the latter's attorney: "We are ready to go on with the trial." To which

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the attorney answered: "You and your crowd have nearly killed Jacob Beard, and we can not go on with the trial. You have disabled him so that we can't try the case now." No response was made to the attorney's remark. There was no error in admitting this testimony, because the failure of the appellant to deny the accusation was a tacit admission, and proper to go to the jury, with the other evidence in the case. It is fully shown that the appellants were at liberty to answer the accusation, for their own violence had ended the proceedings before the justice, and there was nothing to prevent them from making an answer to the charge. *Pierce v. Goldsberry*, 35 Ind. 317.

Complaint is made by the appellants of the refusal to give an instruction asked by them. Counsel for appellee stoutly maintain that the complaint is unavailing, for the reason that the record does not show when the instruction was asked, and contend that, for aught that appears, it was not asked at the proper time. The record sustains the claim that it does not appear that the instruction was asked at a proper time, and the law supports the contention that, unless it does affirmatively appear that the request was made in due season, the ruling can not be successfully assigned for error. This we say, because one complaining of a ruling must, in order to secure a reversal, affirmatively show that he placed himself in an attitude to rightfully ask that which the court refused him. If this is not done the presumption of regularity, which always attends the proceedings of the trial court in the absence of a contrary showing, will require the appellate court to assume that the party did not do that which the law required him to do, in order to entitle him to the ruling asked. It is a long settled rule that instructions must be asked before the argument begins, or the court may rightfully refuse them. R. S. 1881, sec. 533; *Malady v. McEnary*, 30 Ind. 273; *Ollam v. Shaw*, 27 Ind. 388; *Chance v. Indianapolis, etc., Co.*, 32 Ind. 472; 1 Works' Pr. 509; Buskirk's Pr. 344, 345.

It is also contended by appellee that, as the record does

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not affirmatively show that all of the instructions are in the record, it must be presumed that the instruction refused, if a correct one, was embodied in some other instruction, given either verbally or in writing. The cases sustain this view. *Audleur v. Kuffel*, 71 Ind. 543; *Bowen v. Pollard*, 71 Ind. 177; *Myers v. Murphy*, 60 Ind. 282; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110.

Judgment affirmed.

No. 9599.

COOMLER v. HEFNER.

86	108
127	92
86	108
134	132

LANDLORD AND TENANT.—*Tenancy by Sufferance*.—A tenancy by sufferance arises when a tenant, who came into possession lawfully, holds over wrongfully after the determination of his interest.

SAME.—*Tenancy from Year to Year*.—Under the statute concerning the relation of landlord and tenant, a tenancy for an indefinite time is a tenancy from year to year.

SAME.—*Holding Over*.—When a tenant for a fixed period holds over the time, with the consent of the landlord, it becomes a tenancy for another like term; unless, as in this case, the parties stipulate for a different term.

SAME.—*Notice to Quit*.—Notice to quit is necessary in order to terminate either a tenancy at will, or, in the absence of a special contract, a tenancy from year to year.

From the Huntington Circuit Court.

J. B. Kenner and J. I. Dille, for appellant.

J. C. Branyan, C. W. Watkins, M. L. Spencer and S. M. Saylor, for appellee.

WOODS, C. J.—Action commenced before a justice of the peace, by the appellee against the appellant, to recover the possession of real estate. The appellant had occupied as the tenant of the appellee, and the question is whether a notice to quit was necessary in order to terminate the tenancy. It

is conceded that no notice was given, and for this reason the appellant claims that the verdict against him is contrary to the law and the evidence, and, consequently, that his motion for a new trial should have been granted. Counsel for the appellee insist that a notice to quit was not necessary, because the evidence shows either a tenancy at sufferance or a tenancy which terminated at an agreed time.

There is no material conflict in the evidence in respect to its bearing upon the point. The appellee testified: "I rented the farm to Mr. Coomler, about seven years ago, for one year. When the year was up he came to me and wanted to know if he could stay longer. I told him that he could. I said he could stay as long as we agreed, but that he was to give up possession of the place whenever I wanted it. There was but very little said about the matter. Afterwards he remained there under that contract, which was oral, for about seven years. It was always my understanding that Coomler was to leave whenever I desired him to do so. * * * I rented the place to Coomler at first for one year, and at the expiration of one year I told him he could stay on until I told him to get off. About September, 1879, I sent my son to tell him that he could not have the place any longer."

The appellant testified: "I went on to the farm of John Hefner about the first of September, 1872, and was there over seven years. There was no special contract as to the time, but I was to have the farm so long as we could agree, and I was to give Hefner one-third grain rent. We never had or made another contract. I spoke to Mr. Hefner about some talk I heard about his putting me off, and Hefner said there was no truth in it, but to go on, and when he wanted me off he would tell me. Mr. Hefner's son came to me last spring and said I must get off. I refused. This was on Thursday, and suit was brought against me on Saturday."

Levi Hefner, the son of the appellee, testified: "I went to him last fall and told him that father told me to tell him that he could not have the place any longer, and that if he wanted

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to put out wheat he, plaintiff, wanted four dollars per acre rent for the wheat land. Defendant sowed wheat on the land. The defendant said he would not give up the farm; that it was too late to get a farm elsewhere."

The statute concerning the relation of landlord and tenant provides:

1. "That estates at will may be determined by one month's notice, in writing, delivered to the tenant."

2. "A tenancy at will can not arise or be created without an express contract; and all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year."

3. "All tenancies from year to year may be determined by at least three months' notice given to the tenant prior to the expiration of the year," etc.

5. "Where the time for the determination of a tenancy is specified in the contract, or where a tenant at will commits waste, or in the case of a tenant at sufferance, and in any case where the relation of landlord and tenant does not exist, no notice to quit shall be necessary." 2 R. S. 1876, p. 336. R. S. 1881, secs. 5207, 5208, 5209, 5213.

"A tenancy at sufferance arises, when a man comes into possession lawfully, but holds over wrongfully, after the determination of his interest." Taylor L. & Ten., sec. 64.

It is plain that the tenancy under consideration was not in the first instance by sufferance; and if it became such it was upon a termination at some time of the prior tenancy.

The original tenancy, according to the testimony of the appellant, was for an indefinite time, and by the statute was a tenancy from year to year.

By the testimony of the appellee it was originally a tenancy for one year, and, at the end of that, it was made, by a new agreement, a tenancy for an indefinite time, and became, by force of the statute, a tenancy from year to year.

Counsel for the appellee argue that, by continuing in pos-

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session after the expiration of the first year, the appellant became a tenant for another year, under the terms of the original contract; and this doubtless would have been the result if there had been a mere continuation of the possession, with the consent of the landlord, express or implied; but the express agreement made between the parties, that he should stay as long as they agreed, and give up possession whenever the landlord wanted it, excludes the application of that doctrine and makes the holding clearly either a tenancy from year to year, or a tenancy at will, and in either case a notice to quit was necessary; and until the proper notice had been given there was and could be no tenancy by sufferance.

The case of *Whetstone v. Davis*, 34 Ind. 510, has been cited, but it is essentially unlike this case.

The provisions of the statute, and the general principles applicable to the subject, this court has had under frequent consideration. *Gordon v. George*, 12 Ind. 408; *Falley v. Giles*, 29 Ind. 114; *Bright v. McOuat*, 40 Ind. 521; *Thiebaud v. First Nat'l Bank, etc.*, 42 Ind. 212; *Tolle v. Orth*, 75 Ind. 298 (39 Am. R. 147); *Burbank v. Dyer*, 54 Ind. 392; *Clark v. Rhoads*, 79 Ind. 342.

Judgment reversed, with instructions to grant a new trial.

No. 9695.

THE HENRY COUNTY TURNPIKE COMPANY v. JACKSON.

NEGLIGENCE.—*Personal Injury on Account of Defective Turnpike.*—That a traveller had previous knowledge of the dangerous condition of a turnpike will not, alone, prevent him from recovering for injuries incurred in consequence of such dangerous condition. Reasonable care by him to avoid injury does not necessarily mean that he shall forego travel over places known to be dangerous, unless such travel is inconsistent with reasonable prudence.

From the Henry Circuit Court.

86	111
139	617

The Henry County Turnpike Company v. Jackson.

J. H. Mellett and E. H. Bundy, for appellant.

J. Brown, for appellee.

BLACK, C.—This was an action to recover damages for an injury to the person of the appellee, occasioned by a defect in the appellant's turnpike, while the appellee was travelling thereon. There was an answer of general denial, and the issue thus formed was tried by a jury. The verdict was in favor of the appellee. Appellant moved for a new trial. The motion was overruled, and judgment was rendered on the verdict. The overruling of the motion for a new trial is assigned as error.

Counsel have argued the questions whether the verdict was sustained by sufficient evidence, and whether the court erred in refusing to give to the jury certain instructions asked by appellant.

Appellee's injury was caused by the overturning of his buggy, in which he was driving on appellant's road, at a place where the road was crossed by a culvert. There was evidence that the general width of the turnpike on its surface was from eighteen to twenty feet; that at the culvert, and for some distance either way from it along the highway, there was a "fill," the grade at the culvert being about twelve feet high, and, as originally made, from sixteen to seventeen feet wide on the surface; that at each end of the culvert the earth had caved in or washed out; that in the middle of the road, over the culvert, there was a depression, and the road slanted toward the south side; that the space on which vehicles might be and were driven over the culvert was from eight feet to nine feet wide, and a person driving over it "had to make a straight drive, or go off"; and that there was no safe way to drive around the culvert. When the head of appellee's horse was about even with the culvert, he shied toward the south, and the buggy ran into the excavation on that side, and was overturned, and appellee was injured, as alleged in his complaint. The cause of the horse's fright was not certainly stated, but there was evidence from which the jury might

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have inferred that it was the noise of bubbling water. The horse did not go down the embankment. There was evidence that the horse was gentle.

The culvert had been in its bad condition for several months, and appellant, during all that time, had notice of its condition, and kept a toll-gate near by, where tolls were collected from travellers.

Appellee had frequently driven over the culvert while it was in that condition, and he considered the place dangerous. For some time before he was injured he had been careful in driving over this place. He thought there was danger that his buggy might sink down or go over at either end of the culvert. Appellee's injury occurred between nine and ten o'clock in the morning. There was evidence from which the jury might have found that, at the time of the injury, appellee was driving carefully, with a view to the dangerous condition of the road.

It is insisted, on behalf of appellant, that, as the evidence showed that appellee had previous knowledge of the defect in the highway which caused his injury, he could not recover; and that the court should have given the instructions asked, which, in different forms, stated that if appellee had such knowledge he could not recover.

We need not take space to review the authorities on the question thus proposed by counsel, for it has been decided by this court, in several recent cases, contrary to the position taken by appellant's counsel. See *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; *City of Huntington v. Breen*, 77 Ind. 29; *Murphy v. City of Indianapolis*, 83 Ind. 76; *Wilson v. Trafalgar, etc., Co.*, 83 Ind. 326.

These cases settle the doctrine in this State, in harmony with authorities elsewhere, that one is not required to forego travel on a highway merely because he knows it to be dangerous, or to show that, in the use of a highway known by him to be dangerous, he used extraordinary care to avoid an in-

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jury, for which he seeks to recover damages; but he should be careful in proportion to the danger of which he has knowledge, and may proceed if it be consistent with reasonable prudence to do so; and it will generally be a question for the jury whether he used reasonable care, his knowledge of the defect in the highway being a circumstance to be considered with other circumstances in determining whether he used reasonable care.

Under the circumstances of this case, it would have been error to instruct, as asked by appellant, that appellee could not recover if he knew of the defect in the highway. The court instructed that the plaintiff was required to prove that he himself used ordinary care, and did not by any negligence of his contribute to the injury. If appellant desired an instruction upon the subject of appellee's previous knowledge, an instruction with proper qualifications should have been asked.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be, and it hereby is, affirmed, at appellant's costs.

No. 10,498.

THE STATE v. THE LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY.

86	114
153	533

88	114
155	25

CRIMINAL LAW.—*Nuisance.*—*Railroad.*—*Town.*—Indictment against a railroad company for a nuisance by obstructing the streets and public square of a town by its tracks, switches and buildings, and by the manner of their use. Special plea, that the defendant had lawfully acquired the right to use the *locus in quo* for the purposes of a railroad, and that in the use of its tracks, switches and buildings, it creates only such temporary obstructions as result from the reasonable and necessary transaction of its railroad business.

Held, that the plea was good on demurrer.

NUISANCE.—*Prescription.*—A right to maintain a nuisance can not be acquired by prescription.

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SAME.—Obstruction of Streets.—An unauthorized and illegal obstruction of the public ways of a town or city is a public nuisance.

SAME.—Railroad.—A railroad in the streets of a city is not of itself a nuisance, but an improper and unreasonable exercise of a right to use a street by a railroad company may become a nuisance.

From the Lawrence Circuit Court.

F. T. Hord, Attorney General, *H. C. Duncan*, Prosecuting Attorney, and *W. H. Martin*, for the State.

G. W. Friedley and *E. D. Pearson*, for appellee.

ELLIOTT, J.—The indictment preferred against the appellee charges an obstruction of the public streets of the town of Bedford, and the public square therein, by railroad tracks and switches, and by a brick building used as a station, and by the manner in which the tracks, switches and station were used. The appellee answered by a special plea, wherein it alleged that it had acquired the right to a line of turnpike road, projected by the State under the general system of internal improvements, under the act of 1836; that under the act allowing private corporations to take possession of such roads as were abandoned by the State, and under the act incorporating the appellee, title was acquired by it for the purposes of a railroad; that upon the request of the citizens of the county of Lawrence, and town of Bedford, it located its road, laid its tracks, and built its station in the places designated in the indictment; that the commissioners of the county submitted the question of granting the right to the streets and public square to the voters of the county, and that seven-eighths of all the voters, and three-fourths of the taxpayers, voted in favor of granting the right asked; that the value of the right was appraised at \$500, which was paid to the commissioners, and a deed was executed by the county, conveying the right sought by the appellee; that Bedford was not an incorporated town at the time the appellee acquired title, but was incorporated in 1860, and has since levied and collected taxes upon all the tracks and switches, as well as the station building, of the company. The answer states facts showing the manner in which

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the streets and the public square are used, and alleges that there has been no more than a mere temporary obstruction of the streets at times, and no more sounding of whistles or ringing of bells than the law requires; that nothing more is done than is reasonably necessary for the transaction of railway business. We have given only a brief outline of the answer, to which the State unsuccessfully demurred.

Under the present statute a corporation may be indicted for maintaining a public nuisance. R. S. 1881, section 1897.

This statute applies to nuisances erected prior to its adoption, if afterwards maintained, and this for two reasons: Every continuance of a nuisance is a fresh nuisance; no vested right can grow out of the commission of an indictable offence.

The railroad company could not acquire by prescription a right to maintain a nuisance. *State v. Phipps*, 4 Ind. 515; *Miller v. Stowman*, 26 Ind. 143; *Pettis v. Johnson*, 56 Ind. 139; *Sims v. City of Frankfort*, 79 Ind. 446; *Commonwealth v. Upton*, 6 Gray, 473; *Queen v. Brewster*, 8 Up. Can. C. P. 208.

An unauthorized and illegal obstruction of the public ways of a town or city is a public nuisance. *State v. Berdetta*, 73 Ind. 185; S. C., 38 Am. R. 117.

If, in this case, the acts of the appellee were unauthorized and illegal, then the obstruction of the public streets and public square constituted a public nuisance, for which an indictment will lie; but, according to the admitted allegations of the answer, the possession and use for railway purposes of the streets and square was under authority of the Legislature, and what the Legislature authorizes can not be deemed a public nuisance. *Pittsburgh, etc., R. W. Co. v. Brown*, 67 Ind. 45 (33 Am. R. 73).

A railroad in the streets of a city is not in itself a nuisance, and it can not be inferred from the occupancy of the streets for that purpose that a nuisance is created. *New Albany, etc., R. R. Co. v. O'Daily*, 12 Ind. 551; 2 Dillon Mun. Corp., section 701, *et seq.*

It is admitted by the counsel for the State that the answer

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shows a right to use the public places named in the indictment for railroad purposes; but it is contended that this does not give a right to maintain switches and side tracks, or to improperly operate the road. We quote from their brief: "Again, all that part of defendant's answer in which is recited the various acts of the Legislature by which its title and right to build a railroad to any point in the State of Indiana, constitute no part of a defence to this indictment. That right is not disputed, nor is it sought to interfere with it." From this it appears that the right to use the public places for railway purposes is conceded, and the only question, therefore, is as to the mode of the use and the manner in which the right to use are exercised.

It follows from the general principles which we have stated, that the railway company could not, and did not, acquire a right by prescription to maintain a public nuisance; but it also follows that the right to use the streets having, as is here conceded, been granted by law, such a use, in itself, can not become an indictable offence. It further follows that, although the railroad company may have a right to use the public places specified, it has no right to unreasonably or unnecessarily obstruct them, for an improper and unreasonable exercise of a right to use a street may become a nuisance. *State v. Berdette, supra.*

The doing of a lawful act in an illegal and wrongful manner may cause the thing done to be treated as a public nuisance. This doctrine is illustrated by the many cases which hold that a business strictly lawful in itself may be so conducted as to become an indictable offence. *Owen v. Phillips*, 73 Ind. 284. A railroad company having a right to use the streets may unquestionably be subject to indictment if it so abuses its rights and privileges as to unnecessarily or unreasonably encumber or obstruct the streets.

It is not to be supposed, however, that because the necessary, careful and reasonable use of the streets inflicts some temporary inconvenience, or in some measure obstructs the

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free use of the streets, an indictment will lie. As long as the railroad company uses proper care, and makes reasonable efforts to so conduct its business as to cause no unnecessary obstruction, it can not be deemed the author of a nuisance. While it has no right to unnecessarily obstruct the streets, it has a right to use them, in a reasonable manner, for the necessary transaction of its business.

It is a rudimental doctrine that the grant of a principal power confers, by implication, all such powers as are necessary to effectuate the principal grant; and, therefore, in granting land for the purposes of a station for receiving and discharging freight and passengers, and the use of streets for that purpose, the grantor, whether the public or an individual, impliedly confers all such incidental rights as are necessary to carry into effect the main grant. If, then, the appellee did not unreasonably or unnecessarily obstruct the public streets, and did no more than make a reasonable and proper use of the right acquired under the grant from the State and the county, it can not be held to have created or maintained a public nuisance.

The facts stated in the answer very fully show that the appellee has not unreasonably or unnecessarily obstructed the public ways, but that it has used care to prevent doing so, and has done no more than make a fair and reasonable use of the rights vested in it by the laws of the State and the admitted grant of the county.

Judgment affirmed.

No. 10,022.

THE STATE, EX REL. JEFFRIES, *v.* KILROY.

COUNTY SUPERINTENDENT.—*Appointment.*—*Eligibility.*—*Office and Officer.*—*Alien.*—*Inhabitant.*—*Citizen.*—An inhabitant of a county during one year preceding his appointment to the office of county superintendent is not

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ineligible thereto because not a citizen thereof during so long a time. A citizen is a native or naturalized person. An inhabitant is one having a fixed and permanent residence in a county.

SAME.—*Common Schools.—Township Trustees.—County Auditor.*—In the appointment of a county superintendent of common schools, under section 4424, R. S. 1881, the county auditor, although clerk of such election and authorized to give the casting vote in case of a tie, has no power to dictate the manner of voting, or to declare the result of a vote of the trustees.

SAME.—In making such appointment the means and mode of arriving at a result are to be determined by the trustees, without dictation from others.

From the Posey Circuit Court.

E. M. Spencer and *W. P. Edson*, for appellant.

W. Loudon, *A. P. Hovey* and *G. V. Menzies*, for appellee.

FRANKLIN, C.—Appellant, as relator, filed a complaint in the Posey Circuit Court against appellee, to oust him from the office of county superintendent of schools, and to have himself declared the legal holder of the office. A demurrer was sustained to the complaint. Appellant excepted, refused to amend, and appealed to this court. The error assigned is the sustaining of the demurrer to the complaint. The complaint is in four paragraphs. The questions for decision are the sufficiency of each of said paragraphs on demurrer. That part of the first paragraph, which is different from anything in the other paragraphs, contains, among other things, the following averments: "That at said election for county superintendent of schools, on the 6th day of June, 1881, the only person voted for," etc., "who was eligible to said office, was the said Jeffries; that said Kilroy" (who was voted for) "was born in Ireland, of Irish parentage, and was not a *citizen* of the United States of America until he was naturalized, on the 16th day of April, 1881, and by reason thereof the said Kilroy was not, and could not have been, an *inhabitant* of *Posey county* aforesaid, in the sense of section 4, of article 6, of the Constitution of Indiana, for and during the period of *one year next preceding the said vote*," etc., "and was therefore

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ineligible to said office, and that by reason of the premises the said Jeffries was duly appointed to said office."

Section 4, of article 6, of the Constitution of Indiana provides, that "No person shall be elected or appointed as a county officer who shall not be an elector of the county; nor any one who shall not have been *an inhabitant thereof during one year* next preceding his appointment."

It is contended by the appellant that the word *inhabitant*, as used in the Constitution, means *citizen*, and that said Kilroy was not a citizen of said Posey county until after his naturalization, which was not one year prior to his said appointment.

Words used in a Constitution, dependent upon a ratification by the people, must be accepted in the sense most obvious to the common understanding, in the belief that that was the sense designed to be conveyed. Cooley Const. Lim. 66. According to the common understanding, there is a plain difference between the meaning of the words *inhabitant* and *citizen*. The word *inhabitant* means "one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor." A *citizen* is a native or naturalized person.

That the words were not the same in meaning or effect seems to have been understood by the framers of the Constitution of 1816, for in article 11, section 14, in defining the qualifications for an appointment to a county office, the following language is used: "No person shall be appointed as a county officer, within any county, who shall not have been a citizen and an inhabitant therein, one year next preceding his appointment." Thereby imposing the double qualification of citizenship and inhabitancy. If the terms were synonymous, why use them both? With a few changes and additions, not affecting the question now under consideration, the Constitution of 1851 in this regard is the same in meaning as that of 1816, except the omission of the important word *citizen*, and in lieu of which is substituted *elector*, the latter being a word, under the present Constitution, of much narrower import and

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meaning, and the existence of which is not required for one year preceding. By the present Constitution, citizenship is retained as a qualification to a number of the State offices, but omitted as to the county offices.

McCrary on Elections, sections 45 and 46, says: "It seems very manifest that where the term 'inhabitant' is used especially in describing the qualifications of voters, it does not mean the same thing as citizen. It must be conceded that while the two terms may to a certain extent mean the same thing, the term citizen has a more extensive signification than the term inhabitant, and it is therefore entirely fair to presume that when the framers of a law intend to express this larger meaning, they will use the larger term."

Without discussing the authorities referred to by appellant, we think this question has been settled, so far as this State is concerned, by the former decisions of this court. In the case of *Smith v. Moody*, 26 Ind. 299, it was held that the right to vote and the legal capacity to hold office are not essential to citizenship. Allegiance on the part of the person, and the duty of protection on the part of the government, constitute citizenship under the Constitution.

In the case of *McCarthy v. Froelke*, 63 Ind. 507, the question under consideration was expressly decided, and this court held, that if the appellee in that case was eligible to a county office on the day chosen, he must have been eligible to the inferior position of township trustee. The court says: "Under these provisions of the Constitution, if we hold that a citizen of the United States, having the other necessary qualifications, is eligible to the office of governor, lieutenant governor, senator or representative, we must hold that an elector of a county, having the other necessary qualifications, is eligible to a county office, although he may not be a citizen of the United States."

There is no pretence that appellee was not an elector, and a resident of the county of Posey for more than one year next preceding his appointment to the office of county superinten-

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dent. Such being the case, by a fair interpretation of the Constitution and the authorities referred to, although not a citizen of the United States until in April before the said 6th day of June, 1881, when he was so appointed, still, he was an inhabitant of said county for more than one year preceding said appointment, and an elector at the time of the appointment, and was, therefore, eligible to the appointment.

That part of the second paragraph of the complaint, which is different from anything in the other paragraphs, contains, among other things, the following averments: "That Alfred D. Owen, auditor of said county (empowered by law to take part with said township trustees in making said appointment of said county superintendent of schools), then and there wrongfully caused said township trustees, against their wish and will, to vote *viva voce* for said office instead of by ballot, by dictating to them, and by threatening them that unless they should vote *viva voce* he would not record their votes; and thereupon he proceeded to call the names of each of said township trustees to vote *viva voce*, without any authority from them so to do; that the gross misconduct," etc., "of said Owen as such auditor in so doing worked an injury to said Jeffries by causing Vincent M. Cartwright, a township trustee of Lynn township, in said county, to vote for said Kilroy instead of said Jeffries; and that, without said vote of said Cartwright for said Kilroy, said Jeffries would have had a majority of all the votes cast; and that, by reason of the premises, the said Jeffries was duly appointed to said office."

We think the statement of facts as contained in this paragraph falls far short of showing that appellant was duly appointed to the office. The 33d section of the school law—1 R. S. 1876, p. 789—provides that the township trustees shall meet at the auditor's office of their respective counties on the first Monday in June, 1873, and biennially thereafter, and appoint a county superintendent, etc. The auditor only had a right to act as clerk of the board of election, keep a record of the same, and, in case of a tie, give the casting vote. The

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trustees had the right of controlling the manner of the election. The law does not prescribe the manner of voting, and if the trustees saw fit, either with or without the dictation of the auditor, to vote *viva voce* instead of by ballot, that would not render the election or appointment void; otherwise, appellant would have no claim to the office. If Mr. Cartwright failed to have the independence to vote his sentiments, if they were for Mr. Jeffries, because he had to vote *viva voce* instead of by ballot, that was Mr. Jeffries' misfortune, and not a cause for setting aside the appointment of Kilroy.

That part of the third paragraph of the complaint which differs from the preceding is as follows: "That, at said election for county superintendent of schools, said Owen, auditor of said county, acting as chairman and teller of said election, etc., called the names of said township trustees, who voted *viva voce*, with the following result: Said Jeffries received five votes, and said Kilroy received four votes, Vincent M. Cartwright, township trustee of Lynn township, refusing to vote; that thereupon the said Owen counted all the votes given, and unqualifiedly declared said Jeffries elected, after which said Owen wrongfully permitted said Cartwright to vote for said Kilroy, and himself as such auditor also wrongfully voted for said Kilroy; and that, by reason of the premises, the said Jeffries was duly appointed to said office."

This paragraph does not allege that the board of trustees had canvassed the votes cast and declared Jeffries appointed before Cartwright cast his vote for Kilroy, and when Cartwright voted for Kilroy that made a tie between them, and, under the statute, the auditor had the right to give the casting vote. The auditor's declaring Jeffries elected did not amount to anything; he had no right to make such declaration. It was the duty of the board of trustees to do that, and until they had finally settled the matter Cartwright had a legal right to vote.

The fourth paragraph contains nothing new in addition to the third.

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We have given the foregoing extracts from the complaint as they were contained in appellant's brief, in order that we might state all the grounds upon which he claimed a reversal of the judgment, and, in following his brief, we have treated the appointment as an election, but it has very few elements of a popular election about it.

The law simply provides that the township trustees shall appoint, and says nothing about the manner in which the appointment shall be made; any mode that they may adopt by which they can arrive at the expression of the wish of the majority is sufficient to designate the person to be appointed, and there is nothing binding until there is a final determination of the subject by the trustees.

We think neither paragraph of the complaint states facts sufficient to constitute a good cause of action.

There was no error in sustaining the demurrer to the complaint. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

86	124
125	447
86	194
129	298

86	124
149	643

86	124
154	156
154	290

No. 10,667.

THE STATE, EX REL. CROPPER, *v.* MURDOCK ET AL.

JUDGE PRO TEM.—*Repeal of Statute.*—The 4th section of the act of March 1st, 1855, 2 R. S. 1876, p. 10, relative to the appointment of special judges, was not repealed by section 1383, R. S. 1881, on the same subject.

SAME.—*Appointment.*—*Jurisdiction.*—*Collateral Attack.*—*Presumption.*—The appointment of a judge *pro tem.* at one term of court, to act at the next term, though irregular, gives such color of right to act at the next term as to make a judge *de facto*, whose authority can not be questioned collaterally by one who at the time made no objection; and in such case it will be presumed, the contrary not appearing, that there were sufficient reasons for the appointment when made.

From the LaPorte Circuit Court.

The State, *ex rel.* Cropper, v. Murdock *et al.*

W. N. Harding and *A. R. Hovey*, for appellant.

F. T. Hord, Attorney General, *W. T. Brown*, Prosecuting Attorney, and *C. F. Robbins*, for appellees.

ZOLLARS, J.—On the 11th day of July, 1881, on a plea of guilty to a charge of grand larceny, entered in the Marion Criminal Circuit Court, appellant, Cropper, was sentenced to five years imprisonment in the State's prison. After the judgment and sentence, he was conveyed to the prison at Michigan City by the sheriff of the county, and placed in said prison, under the charge and custody of appellee Murdock, who was, and has continued to be, the warden of that prison. To relieve himself from this imprisonment, appellant commenced this habeas corpus proceeding in the LaPorte Circuit Court, in September, 1882. Upon the proper writ, he was brought before the court, a hearing was had, and he was remanded to the prison and to the custody of appellee Murdock.

In the court below, appellant filed exceptions to the return to the writ by Murdock. These were overruled and he excepted. After the decision of the court as above stated, he moved for a new trial. The substance of this motion is, that the finding and decision of the court below are contrary to the law and evidence. This motion was overruled, and he excepted. These rulings are assigned as error in this court.

To establish the wrongfulness and illegality of his imprisonment, appellant introduced in evidence a certified transcript of certain proceedings had in the Marion Criminal Circuit Court. This transcript is before us, as a part of the record in the cause. From this record, the following material facts are shown: On the 2d day of July, 1881, the same being the 156th judicial day of the January term of the Marion Criminal Circuit Court, the Hon. James E. Heller, judge of that court, appointed Hezekiah Dailey *pro tempore* judge of said court. The record of the appointment, oath and other proceedings on that day, is as follows:

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“Comes now Hezekiah Dailey, and presents the following appointment:

“‘STATE OF INDIANA, } ss: *Marion Criminal Circuit Court.*
MARION COUNTY.

I, James E. Heller, judge of the Criminal Circuit Court of Marion county, do hereby appoint Hezekiah Dailey, an attorney of this court, judge *pro tempore* of the said Marion Criminal Circuit Court. JAMES E. HELLER, Judge.

“‘I, Hezekiah Dailey, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Indiana, and that I will faithfully discharge the duties of the office of judge *pro tempore*, of the Marion Criminal Circuit Court, so help me God.

“‘HEZE’H DAILEY.

“‘Subscribed and sworn to before me, this 2d day of July, 1881.

“‘D. M. RANDELL, Clerk.

“‘JAMES E. HELLER, Judge.’”

The clerk of the Marion Criminal Circuit Court, in his certificate to this part of the record, states, that it is “a complete copy of the proceedings had in said court, and entered in the records thereof, in the matter of the appointment of Hezekiah Dailey, Esq., as judge *pro tempore* of the Marion Criminal Circuit Court, and that said Hezekiah Dailey did act as such judge *pro tempore* of said court, under said appointment, and by no other authority, from the 2d day of July, 1881, to the 12th day of July, 1881, both days inclusive, as appears of record in my office.”

Said transcript further shows that, on the 9th day of July, 1881, the same being the sixth judicial day of the July term of said court, Mr. Dailey presiding as such judge *pro tempore*, the grand jury returned into open court an indictment against appellant, Cropper, charging him with grand larceny.

On the 11th of the same month, the same *pro tempore* judge presiding, appellant, Cropper, without any objection on that account, pleaded guilty to the charge and was sentenced to five years’ imprisonment in the State’s prison. In addition

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to the facts so shown by said transcript, it was agreed, on the hearing below, that at the time of the appointment of Mr. Dailey as such *pro tempore* judge, and from that time until the 12th day of July, 1881, both days inclusive, Judge Heller, the regular judge of the said criminal court, was in good health, qualified and competent to hold the court, to receive the report of the grand jury, and to try the cause in which appellant was defendant, in said criminal court.

These agreed facts, and the evidence furnished by said transcript, present the material question in this cause.

It is claimed by appellant that Dailey was not a judge *de jure*, nor *de facto*, at the time the indictment was returned, the plea entered, and judgment rendered in the criminal court, and that, therefore, all of the proceedings in that court, so far as they affect him, were and are void, and his imprisonment based thereon wrongful and illegal. This is the only question discussed by appellant's counsel, and upon it they rest their case.

It is contended that at the time Dailey was so appointed the power of Judge Heller to make an appointment was given and limited by the act of March 7th, 1877 (Acts 1877, p. 28), and that the appointment, as made, was not authorized by that act. If we must look to that act alone for authority, the appointment in this case was clearly irregular and illegal.

Section 4 of the act of March 1st, 1855, 2 R. S. 1876, p. 10, provides, substantially, as follows: If, from any cause, any judge of a circuit court shall be unable to attend and preside at any term of such court, or during any day or part of such term, such judge may appoint, in writing, any other judge of a court of record of this State, or any attorney thereof eligible to the office of such judge, to preside at such term, or during any day or part of said term. Such written appointment shall be entered on the order-book of such court, and such appointee shall, after being sworn, if he be not a judge of any court of record, conduct the business of such court, subject to the same rules and regulations that govern

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circuit courts in other cases, and shall have the same authority during the continuance of the appointment, as the judge elect, or making such appointment.

This court has recently held that this section, so far as it relates to the power of the judge to make appointments in the cases therein provided, was not repealed by the act of 1877, *supra*, and is still in force; and still more recently, that this and other statutes relating to the appointment of *pro tempore* judges applies to the criminal courts of the State. *Zonker v. Cowan*, 84 Ind. 395; *Feigel v. State*, 85 Ind. 580.

We need not go into an examination of the provisions of the Constitution to determine the constitutionality of this act. Its validity has been a settled question in this State for nearly thirty years. *Starry v. Winning*, 7 Ind. 311; *State v. Dufour*, 63 Ind. 567.

Was the appointment of Mr. Dailey valid under the section above set out? It was evidently not the purpose of the Legislature in adopting this section, that the judges of the State might, on any mere pretext, abandon their courts and call others to hold them. This is made the more apparent by the latter part of the section, which provides that except the absence of the judge be caused by sickness, the compensation of the appointee shall be deducted from his salary. What reasons Judge Heller may have had for making the appointment, or whether for any cause he was unable to attend and preside, we do not and can not know from the record in this cause, as upon these points it is silent. It will be presumed in this collateral proceeding, that the reasons were sufficient, and the causes ample.

The appointment in this case was made in the latter part of the January term, and two days before the commencement of the July term, of the criminal court. The appointment is general, not stating whether it was made for the remaining two days of the January term, or the coming July term. On the day it was made, the appointee took the oath and entered upon the discharge of his duties as such, and continued to act

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as such until the 13th day of July, in the July term. From the fact that Dailey continued to preside in the July term, it is evident that the judge meant that his appointment should extend into that term. If the appointment had been presented and recorded in the order-book, with the oath, at the beginning of the July term, and not in the January term, there could be no question about the regularity of the appointment. No particular form is required in the written appointment. In one case, a letter addressed to the clerk, with a request to notify the appointee, was held sufficient. *Kambieskey v. State*, 26 Ind. 225.

A strict construction of the statute, we think, would require the recording of the appointment and oath in the order-book at the term in which the appointee presides. We think that the appointment in this case, as applied to the July term, was irregular; but we are not prepared to say that it and all of the proceedings of the court while the appointee presided were void. The regular judge had the right, under the law, to make an appointment of a judge *pro tempore* to preside in the July term. Mr. Dailey was acting under a written appointment and an oath, which were recorded in the order-book of the court. From the 2d to the 12th day of July, both days inclusive, he presided in the court under the appointment, in good faith, believing, doubtless, that he had a right to so preside. During that time the public acquiesced in that claim of right, and appellant, Cropper, without any kind of objection, voluntarily entered his plea of guilty. What might have been the result if appellant had, at the proper time, in the criminal court, objected to the authority of the presiding judge, and brought his case into this court on appeal, or what the result might have been in a direct proceeding to question that authority, we need not and do not decide.

It is clear to us that appellant can not successfully attack the proceedings and judgment of the Marion Criminal Circuit Court, in this collateral proceeding. *Case v. State*, 5 Ind. 1.

The State, *ex rel.* Cropper, v. Murdock *et al.*

After deciding that the county officers had no right to make the appointment of a judge to preside at the term of court in which Case was convicted, the court says: "However, the view just taken does not dispose of this case. The appointment constitutes a part of the record. It appears in legal form, and gave to the appointee at least a colorable title to the office. He was no usurper, but supposed himself to be rightfully invested, and acted in good faith. A court *de facto*, if not *de jure*, was thus constituted. During the trial, no attempt was made to impeach the authority of that court. And after conviction it was too late to question the validity of the title under which its duties were exercised. It has been decided that an objection to the commission of the judge should be made on the trial."

In the case of *Feaster v. Woodfill*, 23 Ind. 493, the court, after citing and approving the case above, says: "It is then well settled that such an appointment may be made, and when made, even in a case not within the act, that it gives a color of right to the office, so as to make a court *de facto*, if not *de jure*; that in a case when the appointment is regular on its face, the objection must be made at the trial, or all objections to the authority of such appointee will be deemed waived." See, also, *Hyatt v. Hyatt*, 33 Ind. 309; *Kennedy v. State*, 53 Ind. 542; *Watts v. State*, 33 Ind. 237; *Winterrowd v. Messick*, 37 Ind. 122.

It is said by counsel that parties can not, by agreement or otherwise, waive the jurisdiction of the court over the subject-matter. That is true where the court, as a court, has no jurisdiction. The Marion Criminal Court had not only jurisdiction, but exclusive jurisdiction, over the subject-matter in this instance. The objection is not to the court, but to the acting judge of that court. Business can not be transacted in a court without a judge, but the court does not cease to exist with the resignation or death of the judge. The above cases show, and the authorities elsewhere are to the

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same effect, that parties may waive irregularities in the appointment of a judge *pro tempore*.

If such appointee holds under color of right he is, while so holding, a judge *de facto*, and the validity of his acts can not be questioned by a party, for the first time, in a collateral attack. And so in this case it is clear to us that, having submitted his case without objection, appellant can not question the authority of Dailey in this proceeding.

Much learning has been bestowed upon the question as to what, in given instances, may constitute an officer *de facto*, and the proper manner of calling in question the validity of the acts of such an officer. It is not necessary that we should, in this case, enter into a review of the many cases in this and the mother country upon these subjects. They fully support our position in this case, and we content ourselves with a citation of the following: *Ex parte Strahl*, 16 Iowa, 369; *State v. Alling*, 12 Ohio, 16; *State v. Anone*, 2 Nott & McCord, 27; *State v. Carroll*, 38 Conn. 449 (19 Am. R. 409); *Masterson v. Matthews*, 60 Ala. 260.

It follows from the conclusion reached by us in this case, that the judgment below must be affirmed, and it is so affirmed, at the costs of appellant.

No. 9947.

FOWLER ET AL. v. HOBBS ET AL.

EXECUTION.—*Proceedings Supplementary.—Complaint.—Decedents' Estates.—*

Claim.—Judgment.—Assignor and Assignee.—In a proceeding, under section 522 of the code of 1852, by the heirs of a deceased judgment creditor, to subject a claim alleged to have been assigned to the judgment debtor, to the payment of the judgment, the complaint, as against the assignor, need not aver that the judgment debtor had unjustly refused to apply the claim to the payment of the judgment, or had claimed any part of his property as exempt from execution.

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SAME.—Assignment.—Admission.—Answer Filed in Another Action not Conclusive.—An answer by the assignor filed in another action, alleging that he had sold and assigned in writing the claim to the judgment defendant in consideration of his promise to convey him a certain parcel of land, does not conclude him, but he may show that the assignment was never delivered. It is at most a mere admission that may be contradicted.

SAME.—Evidence.—Where, in such action, the evidence shows conclusively that such assignment was never delivered, it is error to order the money arising from such claim to be applied in payment of such judgment.

From the Superior Court of Marion County.

R. Denny, for appellants.

BEST, C.—This is a proceeding supplementary to execution, instituted under section 522 of the code of 1852.

The appellees, John W. Hobbs, Oliver P. Hobbs, Pliny F. Hobbs and Nancy Eaton, children and only heirs of John Hobbs, deceased, allege in their complaint, in substance, that the administrator of said decedent, on the 6th day of July, 1875, recovered a judgment for \$165.30 against one Edward P. Erwin, before a justice of the peace of Marion county, in this State; that an execution issued by the justice was returned unsatisfied; that a certificate of the justice and a transcript of the judgment were filed in the clerk's office; that an affidavit was made that the judgment was unpaid, and that an execution was issued which remains in the hands of the sheriff unsatisfied; that Benjamin Fowler and James P. Fowler, administrators of the estate of Benjamin Fowler, deceased, have in their possession a note of \$1,200 belonging to said estate, the one-third of which belongs to said Erwin by virtue of an assignment made to him by the appellant, who is one of the heirs of said Fowler, deceased; that said debt, together with other property held by said Erwin, exceeds the amount of property exempt by law from execution, and that said judgment remains wholly unpaid.

Afterwards a supplemental complaint was filed, making the clerk of the circuit court a party, alleging that the note had been paid, and that the money was then in the hands of the clerk.

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The appellant, Zachariah D. Fowler, on his own application, became a party, and filed an answer, in which he denied specifically an assignment of his interest in said note to said Erwin. Issues were formed, a trial had, and a finding made for the appellees. The appellant moved for a new trial and in arrest of judgment. These motions were overruled, and judgment was rendered upon the finding. The appellant appealed to the general term, and there assigned as error these rulings, and also assigned as error that the complaint did not state facts sufficient to constitute a cause of action. The judgment was affirmed at general term, and that ruling is assigned as error here.

The motion in arrest, and the assignment that the complaint does not state facts, etc., present the same question, and may be disposed of together. The complaint is said to be defective because it does not aver that Erwin, the debtor, had unjustly refused to apply this claim towards the satisfaction of the appellees' judgment, and because it does not aver that he had claimed any part of his property as exempt from execution. These questions, as it seems to us, affect alone the other parties to the record, and, as they do not raise them, the record does not present them. They might waive them, as they have done by their failure to raise them, and as the appellant is not, as we think, interested in them, he can not present them. The complaint was not, for the reasons urged, insufficient, and, therefore, these assignments of error can not be sustained.

The reasons embraced in the motion for a new trial are, that the finding was not supported by the evidence, and was contrary to the law. An examination of the evidence leads us to the conclusion that this motion should have been sustained. The burthen of the issue was upon the appellees, and, in order to entitle them to recover, it was necessary for them to prove that the appellant had assigned his interest in his father's estate, which consisted of the note in question, to Erwin. The evidence in support of this averment was a written assignment of such interest, made by appellant, and then in the hands of James P. Fowler, and an answer filed by

Fowler *et al.* v. Hobbs *et al.*

the appellant, on the 21st day of May, 1879, in a suit instituted by one Samuel Griffin against appellant, to subject this claim to the payment of a debt alleged to be due from appellant to him. The written assignment purported to transfer, absolutely, all the interest of appellant in said estate to Erwin, and the answer alleged, "that on or about the 15th day of February, 1879, he, appellant, sold and assigned in writing all his interest in said note to one Edward P. Erwin, * * * for and in consideration of the promise made to this defendant by said Erwin and wife, by their deed, to convey to this defendant" eighty acres of land in the State of Missouri. This evidence was sufficient to make a *prima facie* case, but the other evidence showed conclusively that the written assignment, when drawn and signed by the appellant, was left with James P. Fowler, in whose hands it remained, to be by him delivered to Erwin, whenever Erwin should deliver to James P. Fowler a warranty deed, conveying the land in Missouri to appellant, and should produce an abstract of title, showing that he was the owner in fee, and that the title was unincumbered, to the satisfaction of the said James P. Fowler; that afterwards Erwin produced a deed for said premises, and an abstract of title, but James P. Fowler refused to accept the deed, for the reason that it was executed by a third party without naming any vendee, and for the further reason that the abstract showed an outstanding tax title upon the land. Nothing else was done by Erwin to comply with his contract, and the assignment was never delivered, but remained in the hands of James P. Fowler.

The contract seems thereafter to have been abandoned by the parties. At least it was never consummated, and Erwin himself claims nothing under it. The evidence as to the non-delivery of the assignment was undisputed, and shows, beyond all controversy, that Erwin had no interest whatever in the claim in dispute. There was, upon this question of fact, really no conflict in the evidence. The answer of appellant is not inconsistent with the fact that the assignment had

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not been delivered. The averment that he had sold and assigned his interest in consideration of the promise of Erwin and wife to convey the Missouri land implies a conditional sale, and is not tantamount to an averment that the contract had been executed. The non-delivery of the assignment was not inconsistent with this statement, and the whole, taken together, shows conclusively that the appellant had not parted with his interest. At all events the statement was a mere admission, which did not conclude him, and which, like any other, might be explained by the evidence and controlled by the facts established in the case. The statement did not estop the appellant to prove the facts, and as the fact that the assignment was never made was undisputed, it follows that the court erred in awarding the appellees the appellant's money in payment of Erwin's debt.

The motion for a new trial should have been sustained, and for the error in overruling it the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to grant a new trial.

No. 9963.

EVANS v. SCHAFFER.

REAL ESTATE, ACTION TO RECOVER.—*Quieting Title.*—*General Finding May Show Basis.*—*Practice.*—In an action to recover or quiet the title to real estate, when the general denial is pleaded, it is proper that a general finding or verdict show upon what ground it was based, as that the deed, under which the plaintiff claimed title, was made when the possession was held adversely to the grantor.

SAME.—*Judgment, Clause Limiting Effect of.*—*Motion to Modify.*—A clause in a judgment for the defendant, in an action to recover real estate, to the

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effect that the judgment shall not prejudice the rights of the parties as to any other action, practically nullifies the judgment, and on motion should have been stricken out or modified.

From the Clark Circuit Court.

C. L. Jewett, for appellant.

J. K. Marsh and *M. C. Hester*, for appellee.

WOODS, C. J.—Complaint in two paragraphs, by the appellee against the appellant—the first to recover possession of, and the second to quiet title to, real estate. The defendant answered by the general denial. Trial by the court, which made the following finding.

“The court finds that, on the 10th day of April, 1879, one Mary Hartz, by deed of warranty, conveyed to the plaintiff the real estate described in the complaint, to wit,” etc.; “that at the time of the said conveyance the defendant held possession of said real estate under claim and color of title which was adverse to the title attempted to be conveyed to the plaintiff, and that the plaintiff has no right to the possession of said real estate by virtue of said conveyance that he can enforce against the defendant in this action; and upon this ground, and no other, the finding is for the defendant.”

The appellant moved the court to strike out of the finding all between the words, “The court finds,” and the words, “for the defendant,” because irrelevant and not warranted by the issues, and because neither party had requested a special finding. This motion the court overruled, and, in addition to the usual judgment that the plaintiff take nothing and pay the costs, ordered “that this judgment in no way prejudice the rights of the parties as to any other action which may hereafter be brought.” This part of the judgment the appellant moved to strike out, because contrary to law and unauthorized by the pleadings and issues in the case. This motion the court also overruled.

We are of opinion that the court committed no error by embodying in its finding a statement of the exact ground

Vitito *et al.* v. Hamilton.

upon which its decision was based. Under the answer of general denial, the appellant was entitled to avail himself of all manner of defences, whether meritorious or technical; and if in such a case the action is defeated on grounds which do not affect the title nor determine the ultimate rights of the parties, it is eminently proper that the finding, though in the technical sense a general one, as is this, be so framed as to show the fact. In this way the estoppel of the judgment may be limited to what was actually determined, and nothing left to the perils and uncertainty of testimony.

The motion to modify the judgment, we think, should have been sustained. The clause embraced in the motion is repugnant to and nullifies the first and formal part of the judgment. The appellant, upon the finding as entered, was entitled to a judgment that the plaintiff take nothing by the action; and such a judgment necessarily concluded the parties in respect to the right of possession at the time the action was commenced, and as to the fact that the appellant was in adverse possession when the appellee received his deed from Mary Hartz. These facts are determined, and should not be left open for further investigation. But if the objectionable clause is allowed to stand, nothing is determined so as in any way to "prejudice the rights of the parties as to any other action which may hereafter be brought."

Judgment reversed, at the costs of the appellee, and cause remanded with instructions to sustain the motion to modify the judgment.

No. 9407.

VITITO ET AL. v. HAMILTON.

SHERIFF'S SALE.—Purchase by Execution Plaintiff.—An execution plaintiff who purchases at the sale made on his own judgment is a *bona fide* purchaser in such a sense as to be protected against prior equities. ELLIOTT, J., dissents.

86	187
153	257
159	259
152	262

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SAME.—Mortgage.—Reformation.—Right of Purchaser at Sheriff's Sale.—A mistake in the description of mortgaged premises can not be corrected against a *bona fide* purchaser at a sheriff's sale who has acquired title without notice of the mistake.

From the Scott Circuit Court.

C. L. Jewett and *H. E. Jewett*, for appellants.

C. B. Harrod, for appellee.

ELLIOTT, J.—We extract from the special finding made in this case the following facts: On the 17th day of March, 1877, William Hamilton was the owner of the tract of land described in the complaint of the appellee, and on that day executed to the latter a mortgage, intending to embrace therein the land described in the complaint, but by an error in drafting the mortgage the land was not properly described. This mortgage was duly recorded. Afterwards, on the 2d day of July of the year named, William Hamilton executed a mortgage to the appellant, a corporation called Aultman & Co., intending to convey the land described in the present complaint, but the same erroneous description was made as in the mortgage to the appellee. This mortgage was taken by the appellant without any actual notice of that held by the appellee. In October, 1878, the appellant named above brought an action to reform and foreclose its mortgage, obtained a decree on which a sale was made, and the lands described in the complaint were bought by the appellant on the 5th day of April, 1879. The appellee was not a party to the action instituted by the corporation appellant. After the purchase by the latter, the former brought his action to reform and foreclose, and obtained a decree, and at the sale made thereon purchased the land. The appellant named was not a party to appellee's action.

The trial court adjudged the appellee to be the owner of the land, and entitled to possession. The case falls within the rule that one who purchases at a sheriff's sale, although himself the execution plaintiff, is a *bona fide* purchaser, and pro-

The Board of Commissioners of Vigo County v. Fischer.

tected against all prior equities. *Rooker v. Rooker*, 75 Ind. 571; *Gifford v. Bennett*, 75 Ind. 528; *Catherwood v. Watson*, 65 Ind. 576.

The writer does not yield the opinion, heretofore expressed by him, that the rule is unsound, but, on the contrary, adheres to his convictions upon that subject.

As the appellant obtained title prior to any reformation of the appellee's mortgage, it must, under the rule approved by the majority of this court, be held the paramount one. There can be no reformation against a *bona fide* purchaser. We have no brief from appellee.

Judgment reversed.

No. 8337.

86	130
142	467

THE BOARD OF COMMISSIONERS OF VIGO COUNTY v.
FISCHER.

TOWNSHIP TRUSTEE.—Overseer of Poor.—Compensation for Services.—Statute Construed.—The township trustee is *ex officio* overseer of the poor of his township; but, under the fee and salary acts of March 8th, 1873, and of March 12th, 1875, the compensation of the trustee, for all services rendered by him, was limited to the *per diem* allowance specified in such acts respectively, and was payable out of the township fund, and not out of the county funds.

From the Vigo Circuit Court.

C. T. Burton, C. F. McNutt and J. G. McNutt, for appellant.

M. Hollinger, — Huston, J. E. McDonald and J. M. Butler, for appellee.

Howk, J.—The appellee presented to the appellant an account or claim for services rendered by him as overseer of the poor. The appellant made an order to the effect that the claim should not be allowed, and from this order the claimant,

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Fischer, appealed to the circuit court of the county. There, the appellant demurred to the appellee's claim or account, for the want of sufficient facts therein to constitute a cause of action, which demurrer was overruled by the court, and to this ruling appellant excepted. An answer was then filed in two paragraphs, to wit: 1. A general denial; and, 2. Payment in full for the services mentioned in appellee's claim. The cause was tried by the court, and a finding was made for the appellee, in the full amount of his claim. Over the appellant's motion for a new trial, and its exception saved, the court rendered judgment for the appellee, in accordance with its finding.

The first error assigned by the appellant, in this court, is the overruling of its demurrer to the appellee's cause of action. The account and claim of the appellee against the appellant were, in substance, as follows:

"The Board of Commissioners of Vigo County,

To Frederick Fischer, Dr.

"To services as overseer of poor, from October 20th, 1874, to May 20th, 1878, at one dollar per day, for 1075 days, as provided by act for relief of poor, approved June 9th, 1852, section 20, 1 R. S. 1876, p. 680 \$1,075.00.

"I certify that the above account is just and unpaid.

(Signed) "FREDERICK FISCHER,

"Trustee Harrison Township."

"Frederick Fischer says, that he is ex-trustee of Harrison township, in said county; that the bill heretofore filed, and of this made a part, was for services rendered as overseer of the poor; that said township embraces the city of Terre Haute, containing a population of 25,000 souls; that the services rendered as such overseer occupied times not set out under the duties of trustee; that during the whole time of his said office, which embraced four years, he was occupied during nights, Sundays and all unseasonable hours, in discharging his said duties as overseer, answering calls of tramps, widows, orphans, needy and helpless; and that the said county has never paid

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him for said services. Wherefore he asks that he be paid said sum as set out and as asked for."

The question for decision is this: Does this complaint or claim state a cause of action against the appellant? The question is not free from difficulty, because of the fact that there is some confusion in the statutory provisions bearing on the subject. With no little doubt and hesitancy, we have reached the conclusion, that, for the services rendered by appellee, as stated in his complaint, he has no valid or legal claim against the appellant. This conclusion is in harmony with, and supported by, the opinion of this court, in *Tilford, Auditor, v. Douglass, Trustee*, 41 Ind. 580. It was there said: "It is also claimed that the expenses of the poor are all paid out of the county treasury, and not out of the township fund. This seems true as to the disbursements for the relief and support of the poor, but not, we think, as to the pay of the trustee for his services as overseer of the poor. To act as overseer of the poor is, as we have seen, one of his duties as trustee, and for all his services as trustee, as we have shown, he is paid out of the township fund."

In the case cited, the court placed a construction upon the same statutory provisions, in relation to the duties and compensation of township trustees, which were in force during all the time mentioned in the appellee's claim. When the conclusion is reached that, under the statute, it is one of the duties of the township trustee to act as overseer of the poor, then it would seem to follow that, for the services of the trustee in the discharge of his duties as overseer of the poor, his compensation must be limited to the *per diem* fee of the township trustee. Especially so, as the fee and salary act of March 12th, 1875, and the fee and salary act of March 8th, 1873, which two acts covered the entire time mentioned in appellee's claim, both declared in effect that the township trustee should be allowed for his services the *per diem* fees set forth in the acts, and no other. In each of those acts it was expressly provided that the *per diem* fee of the township trustee

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for his services, as stated therein, should "be paid out of the township fund."

We are of the opinion, therefore, that the appellee's claim or complaint did not state facts sufficient to constitute a cause of action against the appellant, and that its demurrer thereto ought to have been sustained. The facts stated show that appellee's claim, if any he has, for the services mentioned therein, can only be asserted under the law against Harrison township.

In the view we have taken of the question for decision, in this case, we are strongly sustained, as it seems to us, by the provisions of section 32 of the fee and salary act of March 31st, 1879, which act was passed subsequently to the time covered by appellee's claim. In this section 32, it was provided as follows:

"The *per diem* of township trustees shall be as follows, to wit: For each actual day's service they shall be allowed to be paid out of the township fund \$2.00: *Provided*, That for all services as overseer of the poor said township trustees shall be paid out of any funds in the county treasury not otherwise appropriated, on the order of the board of county commissioners." Acts 1879, p. 142.

In this section, the *per diem* allowance of township trustees, to be paid out of the township fund, is materially reduced from what it had been under the laws in force during the entire term covered by appellee's claim. The language of the proviso, in section 32, is clearly prospective in its operation. In view of this proviso, it may well be regarded, we think, as a new and substantive provision, intended to compensate the township trustees, to some extent, for the reduction made in their *per diem* allowance. It is very clear, from the language of this proviso, that the General Assembly did not consider the township trustees entitled to any compensation for their services as overseers of the poor, under then existing or prior legislation, other than their *per diem* allowance, to be paid out of the township fund.

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This conclusion renders it unnecessary for us to consider the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the complaint, and for further proceedings.

No. 9215.

REED ET AL. v. HIGGINS, ADMINISTRATOR.

DEMURRER.—*Form of.*—A demurrer to an answer, assigning for cause that “neither of said paragraphs constitutes any defence to this action,” is insufficient under the code, and should be overruled.

SAME.—*Effect of.*—A demurrer to a reply searches so much of the answer as the reply is addressed to, and, if the latter be bad, the demurrer should be sustained to it.

JUDGMENT.—*Court of Common Pleas.*—*Presumption.*—The act abolishing the court of common pleas (1 R. S. 1876, p. 380) expressly continued the existence of terms thereof in session when it took effect, and a judgment thereof, alleged to have been rendered while such term might have been in session, will, in the absence of averment to the contrary, be presumed to have been rendered while the court was in session.

FORMER RECOVERY.—*Pleading.*—An answer of former recovery is bad which merely avers that, in a former suit upon the same cause of action, the defendant, by agreement, recovered judgment for costs.

From the Shelby Circuit Court.

J. B. McFadden and *E. S. Stilwell*, for appellants.

E. P. Ferris, *W. W. Spencer* and *J. S. Ferris*, for appellee.

BICKNELL, C. C.—This was a suit by the appellants, on an appeal bond given on an appeal from a justice of the peace to the court of common pleas of Shelby county.

The suit was brought against the surety alone, the principal having died without any property. After appearing to the action the surety died, and his administrator became the

86	143
134	71
134	76
135	249
86	143
149	303
86	143
164	427

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defendant. The alleged breach of the bond is, that, in said court of common pleas, a judgment was rendered on the appeal, against the appellant in that court and in favor of the appellants here, which judgment remains unpaid.

The appellee answered in four paragraphs:

1. A general denial.

2. That the judgment alleged to be unpaid was rendered by Judge Coffey of said common pleas court, after his office had been abolished.

3. That in March, 1876, an action was pending against said surety, on the same bond, in favor of the present plaintiffs, and that said surety offered to confess a judgment for costs, which offer was accepted by said plaintiffs, and judgment was rendered in their favor upon such confession, which is yet in full force.

4. That said appeal was tried in said court of common pleas by Judge Coffey, prior to March 3d, 1873, and was under advisement when the office of common pleas judge was abolished, and that afterwards, on the 7th of March, 1873, said Coffey, acting as such judge, and when the circuit court of said Shelby county was not in session, rendered his decision, and on said decision rendered final judgment and completed the record therein; and that at the first term of the Shelby Circuit Court thereafter no proceedings were had in said cause, nor at any time since.

The appellants filed the following demurrers: "Come now the plaintiffs, and separately and severally demur to the 2d, 3d and 4th paragraphs of the defendant's answer herein, and for grounds of demurrer say that neither of said paragraphs constitutes any defence to this action."

A demurrer in this form is regarded as a separate demurrer to each of the paragraphs. *Stone v. State, ex rel.*, 75 Ind. 235; *Silvers v. Junction R. R. Co.*, 43 Ind. 435; *Hume v. Dessar*, 29 Ind. 112. One of the errors assigned is overruling these demurrers.

The appellee claims that these demurrers were properly

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overruled, because they present none of the six causes of demurrer enumerated in the code. In *Lane v. State*, 7 Ind. 426, the cause of demurrer was, that the paragraphs "are insufficient in law to constitute a legal defence to the action." The court held that this demurrer should have been overruled; they said: "It is a general demurrer, unknown to our present practice." So, in *Tenbrook v. Brown*, 17 Ind. 410, where the demurrer was that the second paragraph of the answer was "not sufficient in law to enable the defendant to sustain his said defence," it was held bad, as not assigning any statutory cause of demurrer.

The court, therefore, committed no error in overruling the appellants' demurrers to the answers in the present case.

The appellants replied as follows:

1. A general denial as to each of said second, third and fourth paragraphs.

2. As to said second and fourth paragraphs, admitting all the facts therein stated, and averring that said judgment was rendered by said Coffey in the presence of and by consent of all the parties, and of said surety; wherefore said defendant is estopped, etc.

3. As to said third paragraph, admitting all the facts therein stated, and averring that said judgment for costs was not upon the merits, and was not so intended, but was rendered under the following circumstances: The executor of Gregg, the judgment debtor, had commenced proceedings to review said judgment of the court of common pleas, on the appeal in that court, and in said proceedings had had said judgment set aside, and thereupon said surety moved the court to dismiss the suit against him on said bond, at his costs, and offered to confess a judgment for said costs, and did confess such judgment; and judgment was rendered against him therefor; and it was then and there expressly agreed between these plaintiffs and said surety, that such disposition of the case should not prejudice the plaintiffs in any subsequent right of action which they

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might acquire on said bond against said surety in the event of a reversal by the Supreme Court of said judgment of said circuit court.

4. The fourth reply was also pleaded to the third paragraph of answer, and in addition to the facts stated in the third reply, it set forth the answer of the surety in said former suit on the bond, and averred that on appeal the Supreme Court had reversed said judgment of the Shelby Circuit Court, and had remanded the cause; and that plaintiffs afterwards, on a new trial, had recovered judgment for the amount of their original judgment, with interest and costs of suit.

The appellee filed demurrers to each of these replies except the first, for want of facts sufficient, etc. These demurrers were sustained by the court, and this ruling is the second error assigned by the appellants.

These demurrers to the replies search the record, and call in question the sufficiency of the facts alleged in the second, third and fourth paragraphs of the answer. *Richardson v. Seybold*, 76 Ind. 58. Demurrers to these paragraphs of answer were overruled, because, under our statute, such demurrers presented no proper question. The sufficiency of the facts alleged in said paragraphs could not be considered under such demurrers, but is presented by the demurrers to the replies, a bad reply being good enough on demurrer for a bad answer. *Aetna Ins. Co. v. Baker*, 71 Ind. 102.

The second and fourth paragraphs of the answer are insufficient, because it is not true that a judge of the common pleas court lost his jurisdiction to decide cases held under advisement when his office was abolished; nor is it true that he lost such jurisdiction by the abolition of his office and the fact that he did not render his decision and judgment and complete the record at the next term of the circuit court, under section 80 of the act of March 6th, 1873, 1 R. S. 1876, p. 380. Section 83 of this statute provides, that "Any * * common pleas court that may be in session in any county in this State on the taking effect of this act under the provisions of law here-

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tofore existing is hereby authorized to continue such session until the expiration of the term, the same as if this act had not been passed." This court takes judicial notice of this statute, and of the fact that prior to March 6th, 1873, the court of common pleas of Shelby county was authorized and required to hold terms of court, for three weeks each, on the first Mondays of March, July and November in each year. Acts 1867, p. 90.

This court knows, therefore, that said court of common pleas was holding such a term when the act of March 6th, 1873, took effect, and had a right, under section 83, *supra*, to continue its session for more than two weeks thereafter, and until the expiration of said term. And this court will presume, in the absence of an averment to the contrary, that Judge Coffey's action was in accordance with the foregoing statutes, and that when he rendered his decision and judgment, and completed his record in the case held under advisement, his court was lawfully continued in session under section 83, *supra*. To show want of jurisdiction in such a case, the answer should aver the abolition of the office of the judge, and that the case under advisement was decided afterwards, but not at the next term of the circuit court, nor at a continued session of the common pleas court, under section 83, *supra*.

The court, therefore, erred in sustaining the appellee's demurrer to the appellants' second paragraph of reply, pleaded to the second and fourth paragraphs of the answer, those paragraphs of the answer being insufficient for want of facts, etc. The demurrer to the second paragraph of reply should have been sustained as to the second and fourth paragraphs of the answer.

The third paragraph of the answer was bad, because it showed that the merits of the former suit were not decided. A good plea of former recovery must show that, in the former suit something was decided upon the same cause of action asserted in the latter suit. See the forms, 3 Chitty Pl. 929, 956. The paragraph now under consideration merely asserts

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that, by agreement in the former suit, judgment was rendered upon confession in favor of the surety, for his costs. That is no bar to a subsequent suit for the same cause of action. If the suit is discontinued, or the plaintiff becomes nonsuited, or if, for any other cause, there has been no judgment of the court upon a matter in issue, the former proceedings are not a bar. *Winship v. Winship*, 43 Ind. 291; *McSweeney v. Carney*, 72 Ind. 430; *Stevens v. Dunbar*, 1 Blackf. 56; *Sherry v. Foresman*, 6 Blackf. 56; *Gilman v. Rives*, 10 Pet. 298. In *Stingley v. Kirkpatrick*, 7 Blackf. 359, this court said: "The plea * * does not show that the merits of the cause were in issue, * * *. All it alleges * * is, that the defendant and the other makers had been sued upon the same promises; and that the defendant * had recovered * a judgment for costs. The plea is * obviously defective on general demurrer." In *Knox v. Waldoborough*, 5 Greenl. 185, a decision in favor of the defendant, upon an agreed statement of facts, and a nonsuit of the plaintiff and judgment thereon for the defendant for his costs, pursuant to such agreement, were held to be no bar to a subsequent action for the same cause.

Therefore, the demurrers to the third and fourth paragraphs of reply pleaded to the third paragraph of the answer, which is defective for want of sufficient facts, etc., ought not to have been sustained. Those paragraphs of the reply are sufficient for such answer, and the demurrers to them should have been sustained as to the third paragraph of the answer. It may be observed that where the matters sued for were not enquired into in the former suit, that fact may be shown by a reply. *Walker v. Houlton*, 5 Blackf. 348; *Brandon v. Judah*, 7 Ind. 545.

As the cause must be reversed for the foregoing errors, it is not necessary to consider the third error assigned, to wit, that the court erred in its conclusions of law upon the facts specially found. The judgment of the court below ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and it is

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hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial, with instructions to the court below to sustain the demurrers to the second paragraph of the reply as to the second and fourth paragraphs of the answer, and to sustain the demurrers to the third and fourth paragraphs of the reply as to the third paragraph of said answer, with leave to both parties to amend their pleadings.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The petition admits that a demurrer searches the record, but it claims that it does so only when the point is assigned for error and argued. This position can not be sustained.

In *Aetna Ins. Co. v. Baker*, 71 Ind. 102, this court said: "It is claimed by the appellant's counsel, that the appellee Baker can not complain of the insufficiency of the several paragraphs, * * of the appellant's answer, because he has failed to assign any cross errors in this court; but it seems to us that the question of the sufficiency or insufficiency of these paragraphs of answer is fairly presented by the record, * * even in the absence of any assignment of cross errors."

The petition for a rehearing should be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

No. 9556.

BURGETT v. BOTHWELL.

JUSTICE OF THE PEACE.—*Jurisdiction.*—*Recovery of Real Estate.*—Justices of the peace have no jurisdiction to hear and determine an action for the recovery of real estate, unless the relation of landlord and tenant exists between the parties, or unless possession has been unlawfully and forcibly taken, or the real estate unlawfully or forcibly detained.

SAME.—*Complaint.*—*Arrest of Judgment.*—*Practice.*—Where, in an action for the recovery of real estate, commenced before a justice of the peace, the

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complaint does not aver that the relation of landlord and tenant exists, or that possession of the property was unlawfully and forcibly taken, or was unlawfully and forcibly detained, it is insufficient on a motion in arrest of judgment on appeal in the circuit court.

SUPREME COURT.—*Rehearing.*—*Transcript.*—A rehearing will not be granted to enable a party to obtain a corrected transcript.

SAME.—The Supreme Court will not decide questions not arising in the record.

From the Morgan Circuit Court.

J. H. Jordan, for appellant.

W. R. Harrison and *W. S. Shirley*, for appellee.

BEST, C.—The appellee brought this action against the appellant, before a justice of the peace, to recover the possession of certain real estate. The complaint, omitting the formal parts, was as follows: "The plaintiff complains of the defendant, and says, that on the — day of ———, 1877, the defendant peaceably entered into the possession of the following real estate, in the town of Martinsville, in the county of Morgan, and State of Indiana, to wit: The E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of lot 1, in block No. 19, in the original plat of said town; and that plaintiff has been and now is entitled to the possession of said ground and tract of land and buildings situated thereon, and has been since the 1st day of February, 1880, and the 1st day of January, 1881; that the defendant unlawfully kept, and still keeps, plaintiff out of the possession thereof, and thereby plaintiff has sustained damages in the sum of \$100. Wherefore," etc.

The cause was tried before the justice, appealed to the circuit court, and there tried, and, over motions for a new trial and in arrest of judgment, final judgment was rendered for the appellee.

The errors assigned are, that the court erred in overruling the motion in arrest of judgment, in overruling the motion for a new trial, and that the complaint does not state facts sufficient to constitute a cause of action.

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The motion in arrest calls in question the sufficiency of the complaint.

Justices of the peace have no jurisdiction to hear and determine an action for the recovery of real estate, as a general rule. This belongs to the circuit court. They have, however, where the relation of landlord and tenant exists between the parties, or where possession has been unlawfully and forcibly taken, or is unlawfully and forcibly detained. 2 R. S. 1876, pp. 662, 665, sections 1 and 12.

Section 1 provides, "That whenever, in pursuance of legal notice, or otherwise, any landlord or his legal representative shall be entitled to the possession of lands, he may, by himself or his agent, have any tenant who shall unlawfully hold over, removed from such lands on complaint before a justice of the peace of the county in which such lands lie," etc.

The complaint utterly fails to show that the relation of landlord and tenant existed between these parties, and, therefore, the case made is not within this section of the statute.

Section 12 provides, that "Any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same against any person having right to possession thereof, or any person having peaceably obtained the possession of lands, who shall unlawfully and forcibly keep the same, against any person having right to possession thereof, may be ousted from such premises, * * * in the same manner as provided in the case of tenants holding over."

The word "or," in the first sentence of this section, is used in the sense of "and." *O'Connell v. Gillespie*, 17 Ind. 459. And, when thus understood, the section confers jurisdiction in such actions in two cases: the first, where possession has been unlawfully and forcibly taken, and the second, where possession has been peaceably taken, but is unlawfully and forcibly kept from the person entitled to it. The complaint avers that possession was peaceably taken, and, therefore, the case is not within the first provision of the statute, and it is not within

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the second because it is not averred that possession was unlawfully and forcibly kept. The language of the complaint is that the defendant "unlawfully" keeps possession, but the statute does not confer jurisdiction where possession is merely unlawfully kept; it must also be forcibly kept. In *Kiphart v. Brennemen*, 25 Ind. 152, this court held that where the complaint merely averred that the defendant "unlawfully" kept possession, the justice of the peace had no jurisdiction of the action, and the circuit court properly refused the plaintiff leave to amend the complaint by inserting after the word "unlawfully" the words "and forcibly and with strong hand," because the justice had no jurisdiction. This case is decisive of the question here presented.

The case, as made by the complaint, was not within the jurisdiction of the justice. *Short v. Bridwell*, 15 Ind. 211; *O'Connell v. Gillespie*, 17 Ind. 459; *Kiphart v. Brennemen*, 25 Ind. 152.

Nor will the complaint be deemed sufficient after verdict. Many defective averments are cured by the verdict, but there are no defective averments in this complaint. The complaint stated a good cause of action, but not one over which the court had jurisdiction. It was decided in *Kiphart v. Brennemen*, *supra*, that such complaint is not defective and can not be amended so as to change the cause of action into one over which the justice has jurisdiction. If such complaint can not be amended in this respect, the same change can not be effected by the verdict. As the jurisdiction of a justice of the peace is limited in actions to recover the possession of real property, the complaint must contain an averment either that the relation of landlord and tenant exists, or that possession has been unlawfully and forcibly taken, or is unlawfully and forcibly kept; otherwise the complaint will be bad on motion in arrest. This complaint contained neither of these averments, and was, therefore, insufficient on motion in arrest of judgment.

The conclusion we have reached upon this assignment ren-

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ders it unnecessary to examine the others. For the error in overruling the motion in arrest the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed in all things, at the appellee's costs, with instructions to sustain the motion in arrest of judgment.

ON PETITION FOR A REHEARING.

BEST, C.—The appellee concedes that this case was correctly decided upon the transcript on which it was submitted, but says that the clerk omitted, by mistake, to copy an averment in the complaint that the possession of the property was "forcibly" detained, and now asks a rehearing to supply this omission. It has several times been decided by this court that a rehearing will not be granted for such purpose. The brief of appellant, filed on January 13th, 1882, distinctly pointed out this objection to the complaint, and as the case was not decided for nearly nine months thereafter, it would seem that the appellee had abundant time within which to make his application for a *certiorari* to procure a correct transcript; besides, if the correction was made, it would not prevent a reversal of the judgment, as there was no evidence whatever that the possession of the premises in dispute was unlawfully and forcibly detained. The evidence tended to show a tenancy between the parties, and the appellee asks us to determine on this petition whether this tenancy was at will, from month to month, or from year to year, and whether a notice offered in evidence was sufficient to terminate such tenancy. No such relation was alleged in the complaint, and, therefore, these questions do not properly arise in the record. The petition should be overruled.

PER CURIAM.—The petition is overruled.

The Board of Commissioners of Bartholomew County v. Jameson.

No. 8618.

THE BOARD OF COMMISSIONERS OF BARTHOLOMEW COUNTY
v. JAMESON.

86	154
130	17
86	154
134	682
86	154
142	599
143	619
86	154
150	345

SUPREME COURT.—*Judgment.—Res Adjudicata.*—The judgment of the Supreme Court upon a question directly presented by the record settles that question in all subsequent proceedings in that cause.

SAME.—*Harmless Error.—Demurrer.*—It is a harmless error to sustain a demurrer to a paragraph of answer which pleads a defence admissible under another paragraph not demurred to, or where the defence so pleaded is allowed to be proved on the trial.

CORONER.—*Authority to Employ Chemist.*—The authority of a coroner to employ a chemist to discover whether poison caused the death of one on whose body he holds an inquest does not restrict him to the employment of a resident of the county.

SAME.—That a coroner was, by corrupt appliances of others, induced to employ a chemist, is no defence to a suit by the chemist to recover compensation for his services.

MAINTENANCE.—One having an interest in the result of a suit, as a guarantor, may lawfully assist in its prosecution.

PARTIES.—*Plaintiff.—Assignor and Assignee.*—Where a person receives money of another, and in consideration thereof agrees to assign to the latter any judgment he may obtain on a claim held by him against a third person, it is an equitable assignment of the claim, and the assignee only can sue therefor.

From the Bartholomew Circuit Court.

F. T. Hord and *W. B. Hord*, for appellant.

J. L. McMaster, *A. Boice* and *C. E. Clark*, for appellee.

ELLIOTT, J.—This case is in this court for the second time. The complaint of the appellee was held to be sufficient when the case was here upon the former appeal, and by this decision one of the principal questions in the case was settled. *Jameson v. Board, etc.*, 64 Ind. 524. In holding the complaint good, the court decided that the coroner has authority to employ a skilled person to make a chemical analysis of the stomach of one supposed to have come to his death by poisoning. We think this ruling was correct. County officers ought to be allowed to take such measures as shall tend to the detection and conviction of persons guilty of felonious homicide, and the

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statute committing to the coroner the authority to employ skilled chemists should receive a liberal rather than a strict construction.

The questions as to the authority of the coroner to employ, and as to the liability of the county to pay, are conclusively settled by the former judgment of this court. The judgment of the appellate court upon a point directly presented by the record is, as to that point, in all subsequent proceedings in the cause *res adjudicata*. The effect of such a decision goes, so far as the particular case is concerned, beyond the rule *stare decisis*. If we were disposed to question the soundness of the ruling made when the case was first here, the principle stated would forbid our doing so, but we have not the slightest disposition to depart from the doctrine then declared.

The fifth paragraph of the answer of the appellant alleges that the appellee was not a physician and surgeon at the time of his employment by the coroner, and that he did not render any services as a physician or surgeon. The record does not require us to decide whether a skilled and competent chemist, who is neither a physician nor a surgeon, can recover compensation for making a chemical analysis of the stomach of a deceased person. The general denial is pleaded, and if the defence asserted by the paragraphs under mention is sufficient, it is admissible under the general denial, and consequently no available error was committed in sustaining the demurrer.

One of the defences set forth in the answer is as follows: "The defendant admits that the coroner requested the plaintiff to render the chemical analysis set forth in the complaint, but avers that the *post mortem* examination was made and had in the presence and view of the dead body, and upon the same, by one Samuel M. Linton, a competent surgeon and physician, who was required to and did perform said service, at the instance and direction of the said coroner; that the plaintiff did not appear, and was not at any time present at said inquest in the presence and view of the said dead body;

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but defendant charges and avers that the only surgical service rendered in or about said inquest was performed by said Linton; that said Linton removed from said dead body the stomach, and the said coroner transferred the same to plaintiff, then being and residing in Marion county, in the State of Indiana, who then made a chemical analysis of said stomach to detect poison therein, which was the only service rendered by the plaintiff; that the plaintiff did not attend or render any service at said inquest, or at any other place as a physician or surgeon. The only service rendered by him was as a chemist, in attempting to detect poison in said stomach; and the coroner was not authorized to employ a chemist for said purpose."

So far as this paragraph counts upon the fact that the services were not performed at the autopsy, but were performed in a different county, it is clearly bad, under the ruling made upon the former appeal. There is neither a statute nor any rule of law, nor any consideration of public policy, requiring us to hold that the coroner can only employ men living in his own county. It would be unreasonable to confine the authority to employ to persons residing within the county, and equally so to require that the analysis should not be made in any other county than that represented by the officer giving the employment. It can certainly detract nothing from the skill of the expert, or the value of his analysis, that he chances to live in the county of Marion rather than in the county of Bartholomew. Nor was it requisite that the analysis should have been made in the county where the death occurred. The law does not require that it shall be made there. The important thing is the accuracy and skilfulness of the analysis. The place where it is made is wholly immaterial.

The counsel for appellant ask us to adhere literally to the words of the statute and hold that only physicians and surgeons who attend the *post mortem* examination are entitled to compensation. We are unwilling to do this, for to do it

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would defeat the purpose for which the statute was enacted. The reasoning of the court in delivering the judgment in the case, when it was here the first time, supplies a complete refutation of the appellant's argument. It was then said by HOWK, J., in delivering the opinion of the court, that "It is very clear, we think, that it was the intent and purpose of these statutory provisions to clothe the coroner of the county, whenever he should be notified that the dead body of any person, supposed to have come to his death by violence or casualty, was within his county, with the necessary power to properly enquire, and if possible ascertain, how, in what manner and by whom such person came to his death, and whether any one was guilty of said death, and the degree of guilt. The welfare of society and the interests of public justice alike demand, that such an enquiry or inquest should be thorough and complete, to the end, that if death has been caused by a criminal agency, the guilty may be discovered, and receive merited punishment, and the innocent may, perhaps, be freed from unjust suspicion."

The sixth paragraph is, in substance, as follows:

That the said Mary Prather, on whose body said inquest was held, was, at the time of her death, and for a long time prior thereto, a resident of Jackson county, in the State of Indiana; that prior to her death, to wit, on the — day of —, 187—, her husband, John C. Prather, procured the Michigan Mutual Life Insurance Company to issue to him a policy of insurance on her life for the sum of \$1,000; that she lived at all times, contracted her sickness and died in Jackson county, and was buried in Bartholomew county, Indiana. Defendant charges and avers that said inquest was caused and instigated by the said Michigan Mutual Life Insurance Company and its agents, in the interest of said company, and the said coroner made said inquest, and caused said chemical analysis to be made, at the suggestion and instigation of said company and its agents, for the purpose of seeking and detecting some cause of death, or pretext whereby

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said company might avoid the payment of said policy of insurance; that the said inquest was made and prosecuted for said purpose by said coroner, for a consideration paid to him by said company, which plaintiff well knew at the time of his said employment by said coroner to make said analysis, and said employment was fraudulent, and did not bind defendant.

We regard this answer as insufficient. It is bad, for the reason that it does not aver that there were no grounds justifying the coroner in taking measures to ascertain the cause of Mary Prather's death. If there were reasons justifying the investigation and the employment of expert chemists, then it does not matter who instigated the proceedings. If a crime has actually been committed, it is immaterial what motives prompt the person who sets the investigation on foot. A murderer is none the less deserving of detection and punishment because the person who instigates the coroner to investigate the circumstances and manner of the death is influenced by selfish or even malicious motives.

The payment of a consideration to the coroner, to induce him to make the proper investigation, can not be deemed to deprive the appellee of the right to compensation for his services. If there was reasonable ground for holding the inquest, and for employing appellee to make the analysis, he is entitled to receive the reasonable value of the services, notwithstanding the fact that a public officer may have wrongfully accepted compensation for performing a duty which his official position required of him. The corrupt act of a public officer can not be deemed a sufficient reason for suppressing an investigation; and to hold that he may not employ the means to make his investigation effective would be, in effect, to declare that, having accepted money from the instigator of the inquest, all proceedings must end. If the appellee's claim itself grew out of a fraud on his part, it would be otherwise; but he can not be defeated upon the ground that a wrong was done by another, although that other chances to be a public officer.

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It is true that, in such a case as that stated by the answer, the interests of the insurance company and the public would be in some degree the same, but this supplies no reason for denying a recovery to one who renders services upon the request of the duly authorized officer. Although the result of the investigation might confer a benefit upon the insurance company there was none the less reason for using energetic and effective means to ascertain the cause of death. The duty to hold the inquest and to make the investigation thorough and complete is not affected by the fact that some individual citizen, or some private corporation, may derive some benefit from the investigation.

The seventh paragraph of the appellant's answer is substantially the same as the eighth, and, if the former was bad, no substantial injury was done the appellant in sustaining appellee's demurrer. If, however, they are not the same, it is still clear that no harm resulted from the ruling on the demurrer, for the record shows that the appellant was allowed to prove all matters that could have been proved had the seventh paragraph been held good.

The case was submitted to the court upon an agreement that the appellee should recover judgment unless his answers to interrogatories proved some one of the defences pleaded by the appellants.

The answers to interrogatories are, in substance, as follows : "The chemical analysis sued for in the complaint was made solely on the request of the coroner of Bartholomew county ; the request for the analysis was made by the coroner, and the agreement was made with him, in his official capacity ; the agreement with him was that the county should pay me \$150 ; I told him that I sometimes had trouble in getting pay for such services from the counties ; the agent of the Michigan Mutual Insurance Company then said that my services should be paid for, or that he would see that they were paid for ; this was the only promise that was made by any agent or attorney of the company.

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"After the analysis was made I filed my claim, which was not allowed; after the refusal of the commissioners to allow the claim, I went to see McMaster and Boice, attorneys at law, and employed them to collect the claim; sometime after this, being in need of money, I went to McMaster and Boice to see if I could not make some arrangements to get money on my claim against Bartholomew county, from the Michigan Mutual Insurance Company, and told them I needed money before I could make collections from the county; they told me they would give me \$150 for the company, provided I would assign the company any judgment which I might recover against the county; this I agreed to do, and they paid me \$150; this money was not given to me as payment of my claim against the county, nor was there any talk that it was to constitute a payment."

In other answers to interrogatories it is stated that the insurance company did not advance or pay any money except the \$150 mentioned; and that the attorney and an agent of the insurance company were with appellee when he made the contract with the coroner, but had nothing to do with the transaction except as stated in the answers copied; and it is also stated that the company did not agree to pay any of the expenses of collecting the claim, and that the appellee was to bear all such expenses.

It is urged by the appellant's counsel that the insurance company became a party to the original contract, and that its payment to Jameson extinguished his claim. This argument assumes too much. The evidence is that the money was not delivered or accepted as a payment. The insurance company was not a party to the contract in any other capacity than as the guarantor of the county, for, as the uncontradicted testimony shows, the company's verbal agreement was to pay in case the county did not. A delivery by a guarantor to the creditor of the amount of his claim against the principal debtor is not necessarily an extinguishment of the debt, and certainly

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not where there is an agreement between the guarantor and creditor to the contrary.

It is also contended that the evidence shows a champertous contract, and that, therefore, the appellee must fail. It is settled that the rule of the common law upon the subject of champertous contracts prevails in this State. *Stotsenburg v. Marks*, 79 Ind. 193; *Greenman v. Cohee*, 61 Ind. 201; *Quigley v. Thompson*, 53 Ind. 317; *Scobey v. Ross*, 13 Ind. 117.

It is clear, however, that the rule does not, and can not, prevail in this State in its full extent since the code of 1852, for it makes radical changes in the common-law rule upon the subject of the assignment of choses in action. The common-law rule is limited in its operation by several provisions of the code, but we deem it unnecessary to notice them. Many of the courts where the code system prevails have denied its force altogether, and the tendency of modern decisions in America is to restrict rather than enlarge the operation of the rule. *Mathewson v. Fitch*, 22 Cal. 86; *Cain v. Monroe*, 23 Ga. 82; *Allard v. Lamirande*, 29 Wis. 502; *Bentinck v. Franklin*, 38 Texas, 458; *Roberts v. Cooper*, 20 How. 467; *Stoeper v. Whitman*, 6 Binney, 416; *Coughlin v. N. Y., etc., R. R. Co.*, 71 N. Y. 443 (27 Am. R. 75); *Orr v. Tanner*, 17 Am. L. Reg. (N. S.) 759. The rule has often been criticised by the English courts; even as early as *Master v. Miller*, 4 T. R. 320, *vide* p. 340, unfavorable criticism was made. But our decisions, as we have seen, declare the rule to be in force in this State, although the extent to which it prevails has not been defined. It may, however, be safely assumed that the rule is narrowed rather than extended, since to hold otherwise would be to oppose the letter and spirit of our code, as well as the general principles of what Austin calls our "judge-made law." *Patterson v. Nixon*, 79 Ind. 251.

Assuming, for the sake of the argument, and for that purpose alone, that the common-law rule prevails in all its rigor, still the case is with the appellee. We affirm this because the in-

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surance company had an interest in the collection of Jameson's claim, and a party having any interest, direct or remote, immediate or contingent, may rightfully aid in the maintenance of the litigation. It is laid down in the old books, that there are many acts in the nature of maintenance which become justifiable from the circumstances under which they are done. They may be justified, where the party has an interest in the thing in variance, as when he has a bare contingency in the lands in question. Bacon Abridg., Title Maintenance. The rule that if the party has an interest he may assist in the litigation can not be on principle, nor is it by the adjudged cases, confined to cases where land is the subject of controversy. Wherever there is an interest, the right to assist in maintaining the suit exists and may be exercised. *Thallhimer v. Brinckerhoff*, 3 Cow. 623; *Gilleland v. Failing*, 5 Den. 308; *Cooley v. Osborne*, 50 Iowa, 526. Coke says that champerty exists "when one maintaineth the one side without having any part of the thing in plea or suit;" and this can not be deemed to extend to one who has a part, although it is in the form of a contingent interest. It would be a harsh rule that would prevent a guarantor or surety from aiding the creditor in his attempt to make the debt off of the principal debtor, and we are glad to say it has no place in our law.

We have assumed that the guarantor has an interest in the action brought to coerce payment from the principal debtor, and we are now to show that this assumption is a just one. A guarantor or surety may, on default of the principal, pay the debt and himself enforce payment, and this he could not do unless he had an interest in the contract, out of which his rights grow and from which his liability springs. Brandt Suretyship, section 176. It makes no difference that the contract is a verbal one, not enforceable under the statute of frauds, for the guarantor may waive the benefit of the statute, pay the debt, and sue his principal.

In *Beal v. Brown*, 13 Allen, 114, the facts were very much the same as in the present case, and the court said: "The

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statute of frauds can not avail the plaintiff. * Although the verbal guaranty was within it, and might have been avoided, if the defendant had seen fit to rely upon the statute when called on by the plaintiff's creditor for the payment of the debt, the defendant was not bound to set it up. He had a right to perform his parol undertaking." *Cahill v. Bigelow*, 18 Pick. 369; *Anderson v. Spence*, 72 Ind. 315 (37 Am. R. 169). As still further showing the interest of the guarantor, there may be cited the rule of equity investing the guarantor with power to compel the creditor to sue the principal, and our statute providing that he may compel proceedings by a notice in writing. *Brandt Suretyship*, section 208. It must follow from these rules that the guarantor has some interest in maintaining the prosecution of an action against the principal by the creditor, and, having such an interest, he may advance money to secure the proper prosecution of the creditor's action.

There still remains a perplexing question. Is the appellee the real party in interest? The evidence shows that the appellee received the full amount of his claim; that what he received was not in payment of his claim, and that he agreed, in consideration of the money received by him, to assign such a judgment as he might recover to the insurance company. It seems to us that he thus divested himself of all beneficial interest in the claim, and vested it in the company. If he retained no substantial interest, then his assignee became the real party in interest, and, under our code, was the only proper plaintiff. In *Rock County Bank v. Hollister*, 21 Minn. 385, and *Third National Bank, etc., v. Clark*, 23 Minn. 263, it was held that one who held notes for collection could not maintain an action upon them. Mr. Pomeroy, after a careful review of the cases, gives an unqualified approval to the case of *Eaton v. Alger*, 57 Barb. 179, where the like doctrine was maintained, although the case was reversed by the Court of Appeals. *Pomeroy Remedies*, section 131. This author cites with commendation our cases of *Swift v. Ellsworth*, 10 Ind. 205, and *Gillispie v. Ft. Wayne, etc., R. R. Co.*, 12 Ind. 398. In *Cum-*

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mings v. Morris, 25 N. Y. 625, notes were transferred, to be paid for when collected, and it was held that the assignee was the real party in interest. The court said: "The plaintiff may, without let or hindrance from the former holder of the notes, receive and appropriate the money that may be collected on them to his own use. This gives him the legal title and makes him the proper party plaintiff. (*Selden v. Pugh*, 17 Barb. 468; *Hastings v. McMurdy*, 1 E. D. Smith, 273; *James v. Chalmers*, 2 Seld. 209; *Ross v. Bedell*, 5 Denio, 467.)"

The principle which decides the sufficiency of this answer was declared in *Killmore v. Culver*, 24 Barb. 656. It was there said: "Is, then, this plaintiff the real party in interest? It seems to me from the evidence given by himself and Tanner,* that he is not. He is not at all interested in the event of the suit, for, should he recover, the money must go to Tanner, and should he fail the loss would not be his, but would fall upon Tanner." Our own cases assert substantially the same doctrine as do those of New York. In *Treadway v. Cobb*, 18 Ind. 36, it was said: "The transfer was upon a parol promise to pay the money all over to the assignor, and was made for a special purpose, other than that of defrauding creditors, it is true, but not for transferring the beneficial interest in the note. The answers, if true in point of fact, were a bar to the suit, and the demurrer to them should have been overruled." *Smock v. Brush*, 62 Ind. 156; *Clafin v. Dawson*, 58 Ind. 408.

In Kentucky, Wisconsin, California and Nebraska, the same general doctrine is declared and enforced. *Carpenter v. Miles*, 17 B. Monroe, 598; *Wiggins v. McDonald*, 18 Cal. 126; *Gradwohl v. Harris*, 29 Cal. 150; *Cornyngham v. Smith*, 16 Iowa, 471; *Rogers v. Omaha, etc., Co.*, 4 Neb. 59. Mr. Pomeroy, in concluding his review of the authorities, says: "The rule deduced from these authorities" (*i. e.*, those cited by him) "is plain and imperative: The assignee need not be the legal owner of the thing in action; if the legal owner, he must of course bring the action; but, if the assignee's right or ownership is for any reason or in any manner equitable, he is still

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the proper plaintiff, in most of the States the only plaintiff, although, in a few, the assignor should be joined as a plaintiff or as a defendant. The plain intent of the statute is to extend the equity doctrine and rule to all cases." Pomeroy Rem., section 127.

In *Reynolds v. Quaeley*, 18 Kan. 361, the doctrine is carried so far as to hold that although the assignment is after action brought, the assignee must prosecute the action, and that the assignor's administrator can not continue the prosecution.

An equitable assignment vests the interest in the assignee, and constitutes him the real party in interest. An equitable assignment is defined to be "Such an assignment as gives the assignee a title which, though not cognizable at law, equity will recognize and protect." Abbott L. Dict. 433. Acting upon this rule, it was held in *Spratley v. Hartford Ins. Co.*, 1 Dill. 392, that, where an insured had given an order for the amount due upon the policy, the action must be brought by the holder of the order, as he was the real party in interest. So, where an order is given upon a particular fund, it operates as an equitable assignment of so much of the fund as the order specifies. *Indiana, etc., Co. v. Porter*, 75 Ind. 428; *Wheatley v. Strobe*, 12 Cal. 92. In such cases the assignee must sue. *Walker v. Mauro*, 18 Mo. 564. But, without further citation, we quote, as declaring the true rule upon this subject, from the author heretofore referred to: "Not only does the rule prevail when the assignment is absolute and complete, and the assignee is the legal owner of the demand; it prevails with equal force in cases where the assignment is simply equitable in its character, and the assignee's title would not have been recognized * under the old system, but would have been purely equitable." Pomeroy Rem., section 127.

It is quite certain that the appellee has received all he can ever get out of his claim, for, by the terms of his agreement, the judgment, the moment it is rendered, will, in equity if not at law, belong to the insurance company, and, this being true, he has no possible interest in the claim. His assignee, how-

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ever, has such an interest as equity will recognize and protect; it is therefore the assignee and not the assignor who must invoke judicial assistance. It must either be true that the claim was extinguished by the payment of the \$150, or it is true that the beneficial interest passed to the insurance company; and as the first alternative is, as we have seen, not true, the last must be.

We can reach no other conclusion than that the evidence sustains the appellant's answer that the appellee is not the real party in interest.

Judgment reversed.

Petition for a rehearing overruled.

No. 9455.

STRIBLING v. TRIPP ET AL.

BILL OF EXCEPTIONS.—*Time of Filing.*—Under the code of 1852 exceptions to rulings at the trial, in order to be available in the Supreme Court, must have been saved by bill of exceptions filed at the time, or within a time given at that term of court.

From the Jennings Circuit Court.

W. B. Hagins and *J. N. Hagins*, for appellant.

D. Overmyer, *A. G. Smith* and *J. L. Yater*, for appellees.

BICKNELL, C. C.—The appellant brought this suit against Tripp and Brougher and the city of North Vernon, alleging that he was the owner of two lots in said city, in block C, and that said Tripp and Brougher owned three lots in the same block, on which were a woollen mill and a mill pond; that, prior to 1875, the plaintiff's lots were dry, and were cultivated by him as a garden, and the surplus water of the mill pond flowed away through an ancient natural watercourse to the southward of plaintiff's lots, and thence through a culvert

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under the J., M. & I. railroad; that, in 1875, said Tripp and Brougher raised the banks of said mill pond several feet, and built a wall or well hole at the mouth of said culvert, which raised the water in said pond and caused the same to flow back upon plaintiff's said lots; that, in 1876, said city of North Vernon graded Chestnut street, and thereby raised an embankment on the south of said woollen mill pond, from four to six feet higher than the plaintiff's lots, which embankment entirely filled up the old outlet of said pond, and prevented the water, which used to flow over plaintiff's lots and into the mill pond and through its outlet, from escaping at all, so that it flowed back upon the plaintiff's lots; that said city built a drain at the intersection of Jackson and Chestnut streets so as to drain these streets into said mill pond, and built a culvert under Chestnut street, the bottom of which culvert was higher than the lower parts of plaintiff's lots, so that the water would stand several inches deep on plaintiff's lots before it would run through said culvert, causing a pond there, and rendering said lots unfit for cultivation, and water-soaked; that said wall or well hole caused washings to be deposited around it, and made a pond there which flowed back through said culvert on Chestnut street upon the plaintiff's lots, creating a nuisance, and making the lots marshy and unfit for cultivation, or for any use; that said city drained a pond at the corner of Jackson and Walnut streets, by a box drain over and upon the plaintiff's said lots, and that the water brought thereby can not run off freely, because of the said mill pond, and said embankment on Chestnut street, and said badly constructed culvert under it; that said drain at the intersection of Jackson and Chestnut streets is so defectively constructed as to cause the water to flow back upon plaintiff's said lots; that said mill pond embankment, said wall or well hole, said culvert under Chestnut street, and said box drain across Walnut street are all nuisances, and ought to be abated.

It is not alleged that the accumulation of the waters is injurious to health. The only injury complained of is that the

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lots have been rendered incapable of cultivation by too much moisture.

The complaint prays for \$200 damages, and an injunction against the continuance of the nuisances, and for other proper relief. The defendants Tripp and Brougher answered the complaint by separate general denials.

The city of North Vernon answered in two paragraphs:

1. A general denial.
2. That the defendant was and is an incorporated city, under the general laws of the State of Indiana; that the common council of said city ordered Jackson and Chestnut streets to be graded and improved, upon the petition of the owners of two-thirds of the whole line of lots bordering on said streets; that in pursuance of said order said grading and improvement were done in a careful and proper manner, using reasonable skill to avoid injury to any one; that said improvements were proper and necessary, and that the damage complained of was the necessary and inevitable consequence of said improvements, and was not caused by any negligence or want of care upon the part of the defendants.

A demurrer to this special answer was overruled. The plaintiff replied in denial. The cause was tried by the court at December term, 1880. The record does not show any exception then taken to any ruling of the court upon the trial. The cause was taken under advisement, and at the March term, 1881, the court found for the defendants.

The plaintiff then moved for a new trial for the following reasons:

1. The finding is contrary to, and not sustained by, the evidence, and is contrary to law.
2. Error of law, occurring at the trial, in refusing to admit certain testimony.

The motion for a new trial was overruled, and to this decision the plaintiff excepted. Judgment was rendered for the defendants; sixty days' time were given within which to file

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the bill of exceptions, and the bill was filed within the time. The plaintiff appealed. The errors assigned are :

1. Overruling the demurrer to the second paragraph of the separate answer of the city of North Vernon.

2. Overruling the motion for a new trial.

The appellant, in his brief, does not discuss the first of these alleged errors; it may therefore be regarded as waived.

As to the second alleged error, one of the reasons filed for a new trial, to wit, the refusal of the court to admit evidence, does not appear in any proper bill of exceptions.

When this cause was tried the code of 1852 was in force. Under that code, in *Sohn v. Marion, etc., Co.*, 73 Ind. 77, and *Backus v. Gallentine*, 76 Ind. 367, and *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569, it was held that exceptions to rulings of the court at the trial must be saved in bills filed at the time of the exception, or within time then duly granted therefor, or within time granted therefor upon the overruling of a motion for a new trial at the same term at which the trial was had. In the case at bar there was no bill of exceptions filed during the trial, nor was any leave therefor granted during the trial, nor at any time during the trial term. The only leave granted was obtained when the motion for a new trial was overruled at a subsequent term.

A bill of exceptions, filed under such a leave, would bring the evidence into the record, but would not save an exception taken at a prior term. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110.

The appellant in his brief admits, and the bill of exceptions shows, a great conflict in the testimony. We can not determine this conflict without weighing the testimony, and this the rules forbid. *Walker v. Beggs*, 82 Ind. 45.

There was evidence tending to support the finding. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9959.

WILSON v. MCCRORY.

SLANDER.—Pleading.—Complaint.—A complaint that the defendant spoke concerning the plaintiff the words, "Perry stole my corn (meaning the plaintiff)," is not bad for want of an averment that the conversation was about the plaintiff, and was so understood by the hearer.

SAME.—In order to be slanderous and actionable *per se*, the words spoken need not in themselves constitute a technical charge of a crime.

From the Rush Circuit Court.

G. H. Punttenney and *A. B. Irvin*, for appellant.

W. A. Cullen, *B. L. Smith*, *J. Q. Thomas* and *J. J. Spann*, for appellee.

WOODS, C. J.—Action for slander; judgment for the sum of \$75 in favor of the plaintiff, the appellee. The appellant claims that the court erred in overruling his demurrer for want of facts to the second, ninth and tenth paragraphs of the complaint, and in sustaining the motion of the appellee to strike out certain paragraphs of answer. No question is presented upon the latter ruling, because the answers which were stricken out are not made a part of the record. *Berlin v. Oglesbee*, 65 Ind. 308.

The objection made to the second paragraph of the complaint is that it is ambiguous in respect to the person concerning whom the words were spoken. The averment is that the defendant "spoke of and concerning the plaintiff the following false and defamatory words: 'Perry stole my corn (meaning the plaintiff).'" It is suggested that Perry is only the Christian name of the plaintiff, and is in common use as such, and consequently that it should have been alleged that the conversation was about the appellee, and was so understood by the hearer. We think the averment sufficient in this respect. The objection to the ninth paragraph is the same, and for the same reason is overruled.

The charge in the tenth paragraph is that "In a certain con-

Wilson v. McCrory.

versation, * * * while speaking of having corn and apples stolen, * * the defendant spoke of and concerning the plaintiff the following false, slanderous and defamatory words, that is to say: 'A week or ten days ago Perry McCrory (plaintiff meaning) came down to my farm with a sack. I watched him (plaintiff meaning), and he (plaintiff meaning) commenced picking up my apples. I hallooed at him (plaintiff meaning), and said, Don't run, I know you (plaintiff meaning). I have been missing my corn, and the same man (plaintiff meaning) who took my apples took my corn.' And the plaintiff avers that by the use of the said words the defendant intended to charge the plaintiff with the crime of larceny, and was so understood by those who were present."

Counsel for the appellant say: "Evidently the defendant had reference to apples and corn that had been stolen before that time, and did not charge the plaintiff with having stolen them, because he says he commenced picking them up. * * If there is no good charge of stealing apples, there is none of stealing corn. * * * It is evident that those apples were in the orchard, on the tree or on the ground. Apples in that condition are not the subject of larceny. It is only a misdemeanor to take them. See 2 R. S. 1876, p. 481, sec. 76."

We consider the paragraph sufficient. It is not necessary that the words spoken shall by themselves constitute a technical charge of a crime, in order to be actionable *per se*. The *colloquium* or introductory averment in this paragraph shows that the words were spoken in a conversation concerning the stealing of corn and apples, and the spoken words are, by proper innuendo, made to apply to the plaintiff; and it is alleged that the defendant, by the use of the words, intended and was understood by the hearers to charge the plaintiff with the crime of larceny. It is not evident that the apples, which the plaintiff should have "commenced to pick up," were not piled in heaps in the orchard, or otherwise in condition to be the subject of larceny; but granting that the reference was to larcenies of corn and apples, or of either, theretofore com-

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mitted, enough is averred to show that the defendant intended to charge the plaintiff therewith, and was so understood by those who heard him.

Judgment affirmed, with costs.

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No. 10,207.

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ATTORNEYS.—Lien for Fees.—Set-Off of Judgments.—An attorney taking a lien for services in procuring a judgment (R. S. 1881, sec. 5276,) acquires a right superior in equity to the right of the judgment debtor to set off a judgment held by him by assignment, against the client, and as against the attorney such set-off will not be allowed.

SET-OFF.—Judgment.—Exemption.—Where one who is entitled to claim property as exempt from execution has no property save a judgment for less than the amount exempt by statute, the judgment defendant will not be permitted to satisfy it by set-off of a judgment against him.

SAME.—Champerty.—One who advances money to a suitor to maintain an action in which the former has no interest, upon an agreement to receive satisfaction by a transfer of the judgment obtained, is guilty of champerty, and an assignment accordingly will be subject to the right of the judgment debtor to set off a judgment held by him at the time against the assignor.

SAME.—Practice.—Pleading.—Judgments may be set off against each other by motion; but where formal pleadings are resorted to without objection, they may properly be tested by demurrer, as in ordinary causes.

SAME.—Judgments on Contract and in Tort.—A judgment founded upon contract may be set off against one arising out of a tort.

From the Montgomery Circuit Court.

W. H. Thompson and J. M. Thompson, for appellants.

A. D. Thomas, J. W. Shelton and J. R. Courtney, for appellees.

ELLIOTT, J.—The complaint of the appellants alleges that they are the owners, by assignment, of several judgments against Jacob Beard; that Beard has a judgment against them, and that they were entitled to have the judgments owned by them set off against that obtained against them by him.

The appellees severed in their answers, and the case has three distinct branches, the questions in each being different. We shall first consider the questions presented by the answers of Thomas, Shelton and Courtney. The substance of their answers is, that they were the attorneys of Jacob Beard, and as such obtained his judgment against appellants for an assault and battery committed upon him; that their services were of the aggregate value of \$335; and that at the time of the rendition and entry of the judgment they filed liens according to law.

The question which these answers present is, whether the lien of an attorney for services rendered in the action which results in the judgment sought to be discharged by setting off judgments against the client, is superior to the rights of the judgment defendants vested in them by judgments acquired by assignment. We feel no hesitation in declaring that the attorneys have the better and senior right. Their services secured the judgment for their client, and upon the principle which gives a mechanic who manufactures an article a paramount right, they should receive their reward. It is no fanciful analogy that likens the rights of an attorney to such cases, for, in a limited sense, his services create his client's judgment. Considerations of public policy require such a result. If a man is overburdened with debt, as John Beard was, and is grievously beaten, as Beard was, he might be utterly unable to secure the services of an attorney to prosecute his action, and thus the wrong-doer escape civil responsibility, and a legal right go unredressed. It is not here a question of ethics but of law; it is not a question as to whether an attorney should, for the honor of his profession, stand for a suitor without reward; the question is one of right, for, by our law, an attorney is entitled to just compensation for his services and a lien for its security.

As our statute gives a lien upon the judgment recovered, and provides how it shall be created, we are not perplexed by the conflict of authority as to the right to hold a lien, but are

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to follow the cases which recognize the right to a lien and determine the rights of the lienors against contesting claimants. It is held by the English courts, which concede the right to a lien, that the claim of the attorney is paramount to that of one holding a counter-claim against the client. *Mitchell v. Oldfield*, 4 T. R. 123; *Morland v. Lashley*, 2 H. Bl. 441; *Randle v. Fuller*, 6 T. R. 456; *Middleton v. Hill*, 1 Maule & S. 240. It is generally agreed, both here and in England, that a solicitor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those claiming as their creditors. *Barker v. St. Quintin*, 12 Mees. & W. 441; *Vaughan v. Davies*, 2 H. Bl. 440; *Wylie v. Coxe*, 15 How. 415; *Stratton v. Hussey*, 62 Maine, 286; *Andrews v. Morse*, 12 Conn. 444. The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected.

The right, as against an attorney, to set off one judgment against another is said by some of the cases to be confined to such a set-off as would constitute a defence to the action wherein the judgment was recovered, and this rule would defeat the appellants, for it is quite clear that they could not have set off their claims against the action of Beard for the assault and battery committed upon him. *Carter v. Bennett*, 6 Florida, 214; *Calvert v. Coxe*, 1 Gill, 95.

There is still another reason why the appellees should prevail. The right to set off one judgment against another is purely equitable, and allowed only where good conscience requires it, and good conscience is far from requiring that an attorney's claim for services in securing the judgment should yield to the claim of those holding rights adverse to their clients, under assigned judgments. *Simpson v. Lamb*, 7 El. & B. 84. It is upon this general principle that those cases proceed, and among them our own, which hold that the judgment creditor can not, by anything he may do, defeat

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the attorney's lien. *De Figaniere v. Young*, 2 Rob. (N. Y.) 670; *Martin v. Kanouse*, 17 How. Pr. 146; *Dunning v. Galloway*, 47 Ind. 182; *McCabe v. Britton*, 79 Ind. 224. In *Johnson v. Ballard*, 44 Ind. 270, the court said, in speaking of our statute: "This statute was intended to secure to attorneys pay for their labor," and held that, although the attorney had notice of an intended set-off, the lien was superior. More directly in point is the case *Adams v. Lee*, 82 Ind. 587. It is held, in *Smith v. Lowden*, 1 Sandf. 696, *Gihon v. Fryatt*, 2 Sandf. 638, and *Purchase v. Bellows*, 16 Abb. Pr. 105, that the costs of the attorney will prevail against a motion to set off judgments, and, as the right to fees is by statute made a legal right, the same rule must apply as to them. It is so applied in the cases of *Ennis v. Curry*, 61 How. Pr. 1, and *Ennis v. Curry*, 22 Hun, 584, which are fully in point. The cases therein referred to, and which seem to hold otherwise, were not founded on a statute creating a legal lien and conferring a legal right, but were founded on a line of cases which held the attorney's right to be an equitable one, existing only in the discretion of the court, and, therefore, inferior to a legal right.

The answer of Jacob Beard presents very different questions from those we have discussed. He avers that the judgment in his favor was recovered for an assault and battery committed upon his person; that he is a resident householder, and entitled to an exemption of \$300; that the judgments assigned to the appellants were rendered upon contracts; that his interest in the judgment against the appellants was of less value than \$300; and that he has no other property. It is argued by his counsel that if the judgments against him are set off against his interest in the judgment in his favor, he will be deprived of the benefit of his exemption, and that this the law will not permit. It is held in *Temple v. Scott*, 3 Minn. 419, by a divided court, that the right of set-off will prevail in such a case as this; but the opinion assumes, what is almost universally denied, that the statute of exemption is to

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be strictly construed, and, starting from this erroneous premise, it is not strange that a wrong conclusion was reached. Our court has, in consonance with the decided weight of authority, held that the statute is to be liberally construed. *Gregory v. Latchem*, 53 Ind. 449. A liberal construction of the statute would lead to a different result from that reached in *Temple v. Scott*, *supra*, and Judge Thompson has shown, by arguments which seem to us unanswerable, that the entire reasoning of the Minnesota court is unsound. Thompson Homestead & Exemp. 893. Two cases are cited by this author sustaining his view that the right of set-off does not exist, *Curlee v. Thomas*, 74 N. C. 51; *Wilson v. McElroy*, 32 Pa. St. 82, and to these may be added *Duff v. Wells*, 7 Heisk. 17. We have seen that the rule is, that the right to set off one judgment against another will not be allowed where it is against good conscience; and to us it seems clear that it would be against conscience to take from an impoverished debtor all means of supporting himself and his family. To permit the appellants to make good their claim would, according to the confessed averments of the answer, take from the debtor all he has, and this can not be done without, as the Supreme Court of Pennsylvania says, resulting "in a palpable evasion of the humane provisions of the act of Assembly."

The answer of Olivia Beard brings before us questions altogether different from those we have considered and decided. It is alleged in her answer, that, prior to the rendition of the judgment in Jacob Beard's favor, she had supplied him with money with which to conduct his action, and that in consideration of this he had agreed to assign to her whatever judgment he might recover, and did, pursuant to his agreement, assign the judgment rendered against the appellants as soon as it was recovered.

One of the questions presented is, whether a judgment obtained for a breach of contract can be set off against a judgment for damages resulting from the commission of a tort.

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We regard it as plain upon principle, as well as authority, that there may be a set-off in such cases. The reason of the rule prohibiting the allowance of set-off in actions *ex delicto* does not apply to cases where all questions are settled by the judgment, and nothing remains of the original act for investigation or decision. But the question is so well settled that discussion would be out of place. Waterman Set-Off (2d ed.), section 344; 2 Hill. Torts, 270.

The answer shows that the agreement to assign was made before the judgment was recovered, and, of course, when no judgment was in existence. An agreement to assign a judgment to be recovered in an action for a personal tort, in consideration of the advancement of money for the sole purpose of waging the litigation, by one who has no interest in the party plaintiff or the subject-matter of the action, is champertous, and can not confer any rights as against the judgment debtor having valid claims against the judgment plaintiff. It is quite certain that Olivia Beard could not have acquired by assignment any right of action for the tort committed on Jacob Beard, for such a right of action can not be assigned.

The claim of Olivia Beard is not put upon the ground that the judgment was assigned to her before the appellants acquired their judgments, but solely upon the ground that the previous agreement by her gave her a prior right. But that agreement, as we have seen, was not a valid one, and upon an illegal agreement no rights can be grounded.

We need not enquire what the rule would be in the case of a wife assisting her husband to wage a litigation against one who had inflicted personal injuries upon her husband, for, so far as the record before us shows, Olivia and Jacob Beard were not related.

An assignee of a judgment secures no greater rights than his assignor could transfer, and Olivia Beard, therefore, took the assignment of the judgment subject to the rights of the

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appellants existing at the time of the assignment, against her assignor. *Robeson v. Roberts*, 20 Ind. 155.

It is said by appellees' counsel that pleadings were unnecessary, and that, therefore, the rulings upon them are immaterial. The practice in a proceeding to set off one judgment against another is not prescribed by any statute, nor is the right to order it done conferred upon the courts by any legislative enactment; but the courts possess the authority, as they do many other powers, in virtue of their general equitable authority over officers and suitors, and as one of the inherent judicial powers which are necessary to the existence of a court. Freeman Judg. (3d ed.), sec. 467, *a*. The method of procedure is generally by motion, although some of the cases declare that it should be by bill or complaint, and others that it may be either by motion or by complaint. In *Lammers v. Goodeman*, 69 Ind. 76, a proceeding by complaint was recognized as a proper one, and in *McAllister v. Willey*, 60 Ind. 195, it was held that where parties in the trial court resort to pleadings without objection, none can be made in this court. We can see no reason why parties may not, if they elect to do so, put the facts on record in the form of pleadings rather than in the shape of evidence, and thus secure the judgment of the court upon the matters of law arising out of the facts. Such a practice has the great advantage of making the records much less cumbersome, and of presenting the law questions much more distinctly and clearly than the practice which carries the entire evidence into the record.

The interests of the parties being separate, and the questions different, the case is one where it is proper to affirm as to some of the appellees and reverse as to others; and we, therefore, affirm the judgment as to all of the appellees except Olivia Beard. As to her the judgment must be and is reversed.

Nowles v. The Board of Commissioners of Jasper County.

No. 10,261.

88	179
127	230

NOWLES v. THE BOARD OF COMMISSIONERS OF JASPER
COUNTY.

COUNTY AUDITOR.—*Fees and Salaries.*—*Statute Construed.*—A county auditor can not recover from the county for services rendered since the act of March 31st, 1879 (Acts 1879, p. 130), took effect, in apportioning among the various funds allowances made to former county treasurers for collecting delinquent taxes. The salary allowed in such act must compensate for such services.

From the Jasper Circuit Court.

S. P. Thompson, for appellant.

R. S. Dwiggins, Z. Dwiggins and W. B. Austin, for appellee.

BEST, C.—On the 6th day of September, 1881, the board of commissioners of Jasper county allowed C. W. Henke, a former treasurer, \$418.26 for collecting delinquent taxes for the year 1872, and allowed D. C. Janes, a former treasurer, \$329.84 for collecting the delinquent taxes for the years 1873 and 1874. At the same time, the board ordered the auditor to deduct these allowances from the settlement sheet of 1881, and to apportion them among the various funds, so as to deduct from each such portion as would have been deducted had the allowance been made at the time the services were rendered. The appellant was auditor, and rendered the services in accordance with the order. These services were worth \$75, and this action is brought to recover such sum.

The court found against the appellant, and we think the county is not liable for these services. They were rendered after the act of March 31st, 1879, went into force, and the right to recover them depends upon the provisions of that act. The 22d section provides that the auditor shall be allowed the sum of \$1,200 per year for his services, and no more, except as provided for in this act. The act provides that the auditor shall receive an addition to his salary in case the inhabitants exceed a specified number; that he shall receive \$100 for all reports made to the auditor of State; that he shall receive

Lucas v. The State, *ex rel.* School Town of Waynetown.

specified fees for certain services and for matters litigated before the board of commissioners, but it makes no provision for the payment of such services as are the basis of this claim. In addition to this the 39th section provides, that "The board of county commissioners shall, unless in cases of indispensable public necessity, to be found and entered of record as part of their orders, make no allowance not specifically required by law to any county auditor," and makes a violation of this provision a misdemeanor. These services were not found to be, nor were they in fact, such services as are contemplated by the above section, and as their payment is not specifically required it follows that the payment is prohibited, and that no recovery can be had for them. These services must be deemed a part of the services for which the salary is allowed, and that sum must compensate the appellant. For these reasons, we think the action can not be maintained, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

No. 9961.

LUCAS v. THE STATE, EX REL. SCHOOL TOWN OF WAYNETOWN.

SUPREME COURT.—*Demurrer.*—*Record.*—*Bill of Exceptions.*—In reviewing a ruling upon a demurrer, the Supreme Court can consider the pleading only as it appears in the record; and if, after the ruling, the court permitted an amendment, the error of so doing, if error it was, should be shown by a bill of exceptions.

TOWN.—*School Trustees.*—*Election.*—*Legalizing Act.*—*Statute Construed.*—*Curative Act not Prospective.*—The act of March 13th, 1875, entitled "An act to legalize the acts of boards of trustees," etc., "where the inspectors of elections have failed," etc., is retrospective and curative only.

Lucas v. The State, *ex rel.* School Town of Waynetown.

SAME.—Town Treasurer. — Action.—Defence.—School Corporation.—It is no defence to an action by a school corporation to recover its moneys of one who had intruded unlawfully into the office of treasurer of the corporation, that another is unlawfully holding that office.

From the Montgomery Circuit Court.

E. C. Snyder, G. D. Hurley and B. Crane, for appellant.

G. W. Paul, J. E. Humphries and A. D. Thomas, for appellee.

WOODS, C. J.—The appellee recovered judgment against the appellant for money alleged to have been received by the appellant for the use of the school town, and converted by the appellant to his own use.

The overruling of a demurrer for want of facts to the complaint is the first error presented.

The objection made to the complaint is, that the action should have been brought in the name of the State, on the relation of the school town, but that when the ruling on the demurrer was made the complaint was in the name of the school town as plaintiff.

As copied into the transcript, the complaint is by the State, on the relation of the school town, and, in considering the ruling on the demurrer, this court can not look beyond the face of the pleading as it appears in the record.

If the fact be, as counsel claim, and as the order-book entries indicate, that after verdict, and pending the motion in arrest of judgment, the court permitted an amendment whereby the State was made the plaintiff, the question whether the court, in permitting the amendment, exceeded its proper discretion, is not saved for want of a bill of exceptions.

The next ruling complained of is the overruling of the demurrer to the second paragraph of reply. Counsel for the appellant concede that this ruling was in accord with the decision delivered in *Dinwiddie v. President, etc.*, 37 Ind. 66, and was right, unless the act of March 13th, 1875, Acts 1875, Spec. Sess., p. 74, is prospective as well as curative in its effect. We are of opinion that that act must be regarded as

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retrospective and curative only. The title is, "An act to legalize the acts of boards of trustees," etc., "where the inspectors of elections have failed," etc. This makes it impossible to give the act a prospective force.

Our conclusion upon this point makes it unnecessary to consider the argument made upon the motion for a new trial, further, at most, than to allude to one point. It is contended that the same reason which made the election of the appellant as school trustee void operated to invalidate the election of a treasurer to the board of school trustees to take the place of the appellant, because that election was participated in by a trustee, whose election by the same rule was also invalid. Conceding, without deciding, this to be so, it does not help the appellant, who, if not himself the lawful treasurer, can not resist the plaintiff's action to recover the money belonging to the school board, on the plea that another is assuming without right to act as such treasurer. The action is on the relation and for the use of the corporation itself, not of any alleged officer.

Judgment affirmed.

No. 10,253.

THOMA v. THE STATE.

SUPREME COURT.—*Assignments of Error.*—*Practice.*—An assignment of error in the Supreme Court is a pleading tendering an issue of law, and must contain the names of the parties to the cause in full and be signed by the party complaining or his attorney; if not, the cause will, on motion, be dismissed.

From the Kosciusko Circuit Court.

A. G. Wood, A. Brubaker and J. H. Brubaker, for appellant.
D. P. Baldwin, Attorney General, for the State.

ZOLLARS, J.—Appellant was prosecuted and convicted in

86	182
124	835
86	182
132	107
86	182
139	500
86	182
159	421
86	182
161	204
162	139

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the court below, under section 2097 of R. S. 1881, for the keeping of a disorderly "liquor shop." From the judgment of that court he has appealed. The record was filed in this court on the 3d day of June, 1882. On the 20th day of the same month the attorney general, representing the State, filed a motion to dismiss the appeal on the ground that there is no sufficient assignment of errors. Upon a paper attached to the record we find the following:

"STATE OF INDIANA }
 v. } Kosciusko Circuit Court,
 "WM. B. THOMA. } February Term, 1882.
 "Assignment of errors."

Following this are five assignments of error, in which the words appellant and appellee are used. From the use of these terms we might infer that the assignments are meant to present questions for the consideration of this court, and by searching the record we learn who the appellant and appellee are; but we can not learn this from the assignment itself, unless the State shall be taken to be the appellant. These assignments are not signed by any one, either as party or attorney.

This court has held a number of times that the assignment of errors is a pleading tendering an issue of law, should contain the names of the parties in full, and be signed by the party complaining or by his attorney. In these respects the assignment in this case is not sufficient, and the motion to dismiss the appeal must be sustained. *Hollingsworth v. State, ex rel.*, 8 Ind. 257; *Henderson v. Halliday*, 10 Ind. 24; *State, ex rel., v. Delano*, 34 Ind. 52; *Estate of Peden v. Noland*, 45 Ind. 354; *Burke v. State*, 47 Ind. 528; *Lang v. Cox*, 35 Ind. 470; *Darnall v. Hurt*, 55 Ind. 275; *Kiley v. Perrin*, 69 Ind. 387; *Louisville, etc., R. W. Co. v. Head*, 71 Ind. 176; *Todd v. Wood*, 80 Ind. 429.

The appeal is dismissed, at the costs of appellant.

THE CITY OF CONNERSVILLE v. THE CONNERSVILLE HYDRAULIC COMPANY.

CITY.—Order on Treasurer.—Holder may Sue Upon.—Mandate.—A city, incorporated under the general laws of the State, may be sued upon a warrant drawn upon its treasurer by the proper officers, by the holder thereof, and he need not proceed by mandate.

SAME.—Evidence of Funds.—In a suit upon a city order, it is not necessary, to entitle the holder thereof to recover, that he should show that the city treasurer had funds with which to pay it, or that he endorsed it "not paid for want of funds."

SAME.—Water-Works Trustees.—Authority to Issue City Orders.—Under sections 3272 *et seq.*, R. S. 1881, the board of water-works trustees of a city, and not the common council, are the proper officers to audit, allow and direct the payment of claims against the water-works; but for debts incurred for water furnished a city, prior to the appointment and qualification of a board of water-works trustees, under section 3270, the common council may rightfully issue warrants on the city treasurer.

From the Fayette Circuit Court.

R. Conner, for appellant.

B. F. Claypool and *J. H. Claypool*, for appellee.

ELLIOTT, J.—The questions which this record presents are these:

First. Can a city incorporated under the general laws of the State be sued upon a warrant drawn on the treasurer by the proper officers, or must the holder proceed by mandate?

Second. Is it incumbent on the holder of the warrant to show that the treasurer had funds, or that he endorsed the warrant "not paid for want of funds"?

Third. Can the common council of a city having a board of water-works trustees, as provided by the act of March 25th, 1879, rightfully authorize the issuing of a warrant on a claim for water supplied through the water-works to the city?

Fourth. Does the matter of supplying and paying for water remain in the control of the common council until the water-works trustees have fully qualified, and can the council right-

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fully issue warrants for debts incurred prior to the time the trustees qualified?

Of these questions, in their order:

First. There can be no doubt as to the right of the holder of a corporation order or warrant to maintain an ordinary civil action upon it; nor can there be any doubt that he is not bound to resort to the extraordinary remedy of mandate. It is well settled that ordinary actions may be maintained against municipal corporations upon their contracts as well as for their torts. Demands against a municipal corporation may be reduced to judgment in like manner as similar demands against natural persons, and where an ordinary civil action will attain this end it is never necessary to resort to the extraordinary remedy of mandate. *Board, etc., v. State, ex rel.*, 11 Ind. 205; *Board, etc., v. Hicks*, 2 Ind. 527; *Heine v. Levee Commissioners*, 19 Wal. 655; *City of Aurora v. West*, 22 Ind. 88; Burroughs Pub. Sec. 623. It is true that the public property can not be seized upon execution, but this does not affect the right to sue and obtain judgment. It is one thing to obtain a judgment and another thing to enforce its collection.

Second. Ordinary corporation orders are evidences of indebtedness upon which the holder may maintain an action. 1 Dill. Munic. Corp., sec. 487; *Wheelock v. Auditor, etc.*, 130 Mass. 486. They constitute *prima facie* causes of action; for the presumption is that the officer by whom they were drawn did his duty. They are not negotiable instruments in such a sense as to be protected in the hands of *bona fide* holders against defences, but they are obligations of the corporation upon which the holder may maintain an action. 1 Dill. Mun. Corp., sec. 502; *Board, etc., v. Day*, 19 Ind. 450.

The treasurer of the corporation is its agent, and his act in refusing to pay the warrant upon presentation is the wrong of his principal. It is not necessary for the holder of the warrant to show that the treasurer endorsed it "not paid for want of funds." It is sufficient for him to show that it was presented and payment refused. If it was the duty of the

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treasurer to make such an endorsement, and he failed to do this duty when the warrant was presented to him, then his wrong was that of the corporation, and not of the holder of the warrant, and it can not be allowed to defeat his recovery. There is, indeed, some conflict among the cases as to whether it is necessary to make any demand at all, some of them holding that ability and readiness to pay are matters of defence. *Indiana, etc., R. R. Co. v. Davis*, 20 Ind. 6; *Maux Ferry G. R. Co. v. Branegan*, 40 Ind. 361; *Varner v. Nobleborough*, 2 Me. 121 (11 Am. Dec. 48).

It is well settled that the holder of a warrant is not bound to show that the municipality had funds in its treasury. It would be a strange doctrine that would impose upon a creditor, holding his debtor's obligation, the duty of showing both a liability and an ability to pay.

Third. The statute commits to the board of water-works trustees the management and control of all matters concerning the supply of water, the collection of water rents, and the payment of expenses incurred in maintaining and operating the water-works. In one of the sections of the act referred to it is provided that the trustees of the water-works shall make such by-laws and regulations for the economical management and protection of the water-works as they may deem necessary. R. S. 1881, sec. 3272. In another section it is enacted that, "For the purpose of paying the expenses of managing and operating the water-works, the trustees of the water-works shall have power to assess and collect, from time to time, a water rent" upon all premises supplied with water. R. S. 1881, sec. 3273. Another section provides that all moneys shall be deposited with the treasurer; and still another provides that "All moneys so deposited shall be kept a separate and distinct fund, subject to the order of said trustees." R. S. 1881, sections 3275, 3276. These provisions, taken in connection with the other provisions of the act, and considered in connection with its general scope and spirit, clearly indicate an intention to take the control of

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water-works, in cities of the class to which the act applies, from the common council, and vest it in the board of trustees. If there was a properly organized board of trustees in the city of Connersville when the debt for which the warrant was issued was incurred, then the trustees, and not the common council, were the proper officers to audit, allow and direct payment of the claim.

In one of the sections to which we have referred it is provided that the fund shall be kept separate and distinct and that it shall be subject to the order of the trustees. The effect of this provision is to create a specific fund for the payment of claims against the water-works, and one which can only be reached in the manner provided by the statute. As the statute creates a separate fund, and provides a specific manner for reaching it, one who has claims upon such fund, accrued subsequent to the time the act went into force, and the organization of a board of trustees under it, must assert his claim through the proper officers, and can not invoke the assistance of other municipal officers who have no authority over the subject or over the fund. A fund provided for a specific purpose, and expressly placed in charge of designated officers, can not be reached by orders issued by officers having no control or authority over it.

Where a public law prescribes the authority and defines the duty of municipal officers, all who deal with the corporation are bound to take notice of the authority and duties of such officers.

Fourth. We come now to the fourth and last question in the case. The act of March 25th, 1879, did not have a retrospective effect, and therefore did not apply to debts contracted by the common council prior to its enactment. It is a familiar rule, that statutes will not be given a retroactive effect unless the rigor of their language is such as to make it the imperative duty of the courts to so construe them.

The general law for the incorporation of cities vested in the common council broad and comprehensive powers over

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the finances, business, and property of the city, and these powers continued in existence, as to the water-works, as well as other municipal property, until the coming in of officers legally authorized and empowered to take charge and control of the works. The question is thus narrowed to this, was the debt for which the warrant in suit was issued contracted before the city of Connersville had a legal board of water-works trustees? The evidence shows that the trustees did not fully qualify until June 7th, 1880, and that the account for which the warrant was issued was for water furnished from December, 1879, to June, 1880. We think this sufficiently shows that the debt for which the warrant was issued was contracted before the trustees came into office, and was then an existing claim against the city.

It is not in the power of the Legislature to substitute one debtor for another in cases where the creditor has acquired vested rights. To give the act of 1879 a retroactive effect, would be to materially change the rights of the appellee, for it would take away the right to deal with the officers with whom the contract was made, and also the right to look to the general treasury of the municipality for payment of the claim. Whether the Legislature had power to do this we need not decide, but the fact that a construction which would give the statute a retrospective operation would result in so radical a change in the rights under the original contract, supplies a strong reason against such a construction.

The burden of impeaching the validity of the warrant was upon the appellant, and this involved the necessity of showing that the demand had not accrued prior to the execution of the contract for furnishing the water. In the absence of evidence upon this point, the presumption is with the finding of the trial court. Judge Dillon says: "County and city orders signed by the proper officers are *prima facie* binding and legal. These officers will be presumed to have done their duty. Such orders make a *prima facie* cause of action. Impeachment must come from the defendant." 1 Dill. Mun. Corp., section 502, auth. n.

Yeoman *et al.* v. Davis *et al.*

It devolved upon the appellant to show that the claim for which the warrant was issued was not a legal demand against the general municipal treasury, and the evidence, so far from showing this, fairly shows that the demand was one upon which the city was liable at the time the order was ordered to be issued, and one for which it was proper to issue the warrant declared on.

Judgment affirmed.

No. 9673.

YEOMAN ET AL. v. DAVIS ET AL.

PLEADING.—*Arrest of Judgment.—Practice.—Special Contract.—Attorney.—*

That a complaint is not sufficiently specific in stating the cause of action, as that its averments imply a special contract for the payment of a salary to an attorney, without stating the terms of the contract, will not justify a motion in arrest of judgment.

From the White Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

W. E. Uhl, for appellees.

BLACK, C.—The appellee Isaac Davis brought his action against the appellants, upon an account stated, and instituted proceedings in attachment.

The other appellee, Martin Witz, filed his complaint and his affidavit and undertaking in attachment, and became a party to said action. Issues were formed, the trial of which resulted in a verdict for each of the appellees, upon which judgments were rendered.

The only matter presented by the appellants for our consideration is the action of the court in overruling their motion in arrest of judgment for the appellee Witz.

Against this ruling it is claimed that the complaint of the

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appellee Witz was insufficient. This complaint was against the appellants as partners, and one Daniel D. Dale, and alleged that the appellants “became and were indebted to the defendant Daniel D. Dale in the sum of \$400, for salary earned by said Dale as their attorney, a bill of particulars of which is filed herewith, marked ‘Exhibit A,’ and made a part of this complaint; that said defendant Dale sold and assigned said debt to the plaintiff, and that the same is yet unpaid and is now due and owing to the plaintiff from the defendants. Wherefore,” etc.

The bill of particulars was as follows:

“Exhibit A.

“Yeoman, Hegler & Co. to Daniel D. Dale,	Dr.
“1878. To three months’ salary, from Oct. 9th, ’78, to	
Jan’y 9th, 1879	\$300
“1879. To one month’s salary, from April 9th to May	
9th	100
	<hr/>
	\$400

“For value received I hereby assign the above account to
Martin Witz. DANIEL D. DALE.

“May 19th, 1879.”

It is said by way of objection to this complaint that Dale’s retainer or employment and the terms thereof were not sufficiently alleged. This objection can not be sustained. If the word “salary” necessarily made the complaint a declaration upon a special contract, it can not be said that no cause of action whatever was stated in the complaint.

The appellants appear to have been content to overlook any want of completeness in the statement of the cause of action, and willing to wait for further information from the evidence. The evidence is in the record, and it supplied all needed information. After verdict it was too late to make such objection to the complaint. The proceedings in attachment seem to have been abandoned on the trial, and there was no judgment against a garnishee or against attached property.

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There were two separate personal judgments, appeals from which to this court were united, and prosecuted by assignments of error upon one transcript.

The judgments should be affirmed.

PER CURIAM.—Upon the foregoing opinion the judgments are affirmed, at the costs of the appellants.

Petition for a rehearing overruled.

86	191
197	587
86	191
145	102
86	191
158	651

No. 9716.

REDDEN ET AL. v. BAKER, GUARDIAN.

INSANITY.—*Contract.*—The contracts of a person duly adjudged insane are void.

SAME.—*Continued and Conclusive Effect of Adjudication.*—*Notice.*—The disability of insanity, once established by an adjudication under the statute, continues and is conclusive until the restoration of reason has been determined in the manner prescribed by the statute, and the world must take notice of it.

SAME.—*Appointment of Guardian.*—The adjudication has no less force before than after the appointment of a guardian, and is not affected by a discharge of the guardian upon a final settlement of his accounts.

SAME.—*Marriage and Change of Name.*—The marriage and consequent change of name of a female insane ward does not affect the force of the adjudication of insanity.

SAME.—*Testamentary Capacity.*—*Quære:* Whether or not an adjudication of insanity under the statute is conclusive evidence of testamentary incapacity?

From the Bartholomew Circuit Court.

J. C. Orr and *J. N. Wheatley*, for appellants.

S. Stansifer, *W. D. Stansifer* and *C. S. Baker*, for appellee.

WOODS, C. J.—The appellee, as guardian of Martha Collier, insane, brought this action to set aside a conveyance of real estate, alleging, that, on the 21st day of July, 1868, the said Martha was, in a regular proceeding had for the purpose,

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found and adjudged to be of unsound mind, and put under the guardianship of William E. Herod; that said adjudication remains in full force; that said Herod, having become a non-resident of the State, was, on the 27th day of March, 1880, removed by order of the court, and the appellee appointed guardian in his stead; that after the adjudication of insanity the said Martha entered into a pretended but void marriage with one Thomas White, and thereafter, on the 14th day of September, 1878, being the owner in her own right of certain real estate (which is described), with said White made a pretended conveyance thereof to the appellant Catharine Redden, wife of her co-appellant Henry. Other facts are averred which need not be rehearsed.

The appellant Catharine filed a separate answer in eight paragraphs, which need not be separately stated, but which show, in substance, that the adjudication of insanity was in July, 1868; that in 1873 said Martha married Thomas White, and was thereafter known as Martha White; that on the 26th day of April, 1873, she received a conveyance to herself by that name of the land in question; that on the 22d day of October, 1873, her guardian Herod made a final settlement report, which was approved, and he was discharged from the guardianship; that the guardianship was so terminated, and, in fact, no guardianship existed over said Martha from Herod's discharge, in 1873, to the year 1880; that, during the time when there was no guardianship, the said appellant, without knowledge or notice of any disability, bought the land in good faith, paying full value therefor.

The court sustained a demurrer for want of facts to the answer, and the question is whether the ruling was right.

The first proposition advanced by the appellant is, in substance, that the contract of a person who, under the statute (2 R. S. 1876, p. 598), has been found and adjudged to be of unsound mind, but, at the time of making the contract, is not under actual guardianship, is not void, but only voidable. In support of this, counsel for the appellant cite from the opinion

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in *Crouse v. Holman*, 19 Ind. 30, the expression following: "The deed of a person, *non compos mentis*, under guardianship, is void; * the decree and letters of guardianship take from him all capacity to convey; but the deed of such person, not under guardianship, conveys a seizin, it being voidable only, and not void." Similar statements are claimed to be found in *Somers v. Pumphrey*, 24 Ind. 231; *Freed v. Brown*, 55 Ind. 310; *Wray v. Chandler*, 64 Ind. 146; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Wait v. Maxwell*, 5 Pick. 217 (16 Am. Dec. 391); *Jackson v. King*, 15 Am. Dec. 354, n. 368; *Mohr v. Tulip*, 40 Wis. 66; *Elston v. Jasper*, 45 Tex. 409.

The cases referred to, which were decided by this court, did not involve, and are, therefore, not authority for, the distinction which we are now asked to declare. The question seems to be a new one in this State, and probably must be determined as a question of statutory construction rather than purely by principle or by authority alone.

By the second section of the act on the subject, cited *supra*, the forming and trial by jury of an issue is required; and by the third section it is provided that if the jury shall find that the person is of unsound mind, the court shall appoint a guardian for such person, who shall have the custody of his person and the management of his estate. Sections 9, 10 and 11 of the act are as follows:

"Sec. 9. Such guardianship shall terminate with the restoration to reason, or death of the ward.

"Sec. 10. Whenever it is alleged that such person of unsound mind has become of sound mind again, the fact may be tried and determined in the same manner as the allegation of the unsoundness of mind. * *

"Sec. 11. Every contract, sale or conveyance of any person, while a person of unsound mind, shall be void."

In our opinion these provisions must be construed to mean that the incapacity or disability once found and adjudged must continue in full force until in the manner provided in the act

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the restoration of mind shall have been tried and determined. Any other view than this must lead to confusion and doubt. The language of the statute, it is true, implies that there shall have been a restoration to reason for some period of time before the fact can be tried and determined, and during such time there can have been in fact no want of mental capacity, but nevertheless it must be held that there was a legal incapacity; else it would be open to proof that there was real capacity—restoration to reason—at any time pending the guardianship, and the adjudication of insanity would at most be an incomplete protection, instead of the perfect shield which the law was designed to make it.

It necessarily follows that there is no place for the proposition that there must be an actual personal guardianship in order to make the disability of the ward complete under the law. It is true that upon the finding of the jury that the person is of unsound mind, it is the duty of the court to appoint a guardian, and the fact of there being such a guardian in charge of the person and estate of the ward may, as counsel argue, be a means of notice and protection to those who might have dealings with the ward; nevertheless, we are convinced that the rule is, and that it would prove unwise and disastrous to hold the contrary, that the adjudication of insanity, or as the phrase is, "office found," establishes the incapacity, and keeps it in force until there has been a judicial determination to the contrary; and of such adjudication, had in the proper court, with jurisdiction properly acquired, the world must take immediate and constant notice until the restoration of reason shall in like manner have been declared.

The fact that there may not at any time be an acting personal guardian can not be allowed to affect the rule. After the adjudication of insanity, there may often be necessary and protracted delay before a suitable person can be found to accept the trust; and so upon the resignation or death, or removal of one who has been acting. It is a mistake, however, in any such case, to say that there is no guardianship. From the time

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of the adjudication of insanity until the restoration to reason has been judicially determined, the person so declared to be of unsound mind is the ward of the court; and whether or not at any particular part of this time there is an appointee of the court to take personal charge, in no manner affects the legal status of the ward in respect to his incapacity to make contracts.

While this conclusion is deduced from the language of the statute, it is also well supported by authority. *L'Amoureux v. Crosby*, 2 Paige, 422 (22 Am. Dec. 655); *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Wadsworth v. Sherman*, 14 Barb. 169; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Leonard v. Leonard*, 14 Pick. 280; *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 243.

In respect to a lunatic's capacity to make a will, a distinction is recognized in some cases, in which it has been held that the inquisition is not conclusive evidence of incapacity in that particular. *Leonard v. Leonard*, *supra*; *Wadsworth v. Sharpsteen*, *supra*; *Breed v. Pratt*, 18 Pick. 115; *Stone v. Damon*, 12 Mass. 488.

Counsel for the appellant insist that their position is directly and explicitly supported by the cases cited *supra*, from Wisconsin and Texas. The Wisconsin case can not be regarded as deciding anything upon the point, either expressly or by implication; and if the other case is more explicit we can not accept it as authority against what we deem to be the proper interpretation of our statute, as well as the better reason and policy.

Counsel next insist that the formal discharge of Herod as guardian, upon his report that his ward had intermarried with White, and that, with the consent of White, he had turned over to her her property, was in effect a termination of the guardianship, and an adjudication of restored reason, upon which the world had a right to act. We do not think so. The court had a right to discharge Herod from the trust, but his application for such discharge could not be made the means of bringing before the court the question whether or not there had been a restoration of the ward's reason. The statute pro-

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vides how that fact may be tried and determined, and it was not competent for the court to entertain the question in any other mode of procedure. If, therefore, the court did attempt to determine, in this instance, upon the hearing of the guardian's report, that the ward had been restored to her right mind, it was done without jurisdiction, and the judgment in that respect is without force; and so every one was bound to know.

It is next insisted that by reason of the marriage of the ward and the change in the name by which she was known, and the fact that the property was conveyed to her after the marriage and in her new name, the appellant could not, and was not bound to, know of the guardianship and disability declared under the former name. No authority is cited, and it is evident that the proposition is untenable. The authorities already cited show that an inquisition and judgment of insanity affect the person concerned, in respect to notice, just as a judgment *in rem* affects the thing, and that, for reasons of public policy, the world must take notice of the procedure. The ends sought to be accomplished can not be attained upon any other rule. It necessarily follows that the change of name in this instance in no manner affected the disability or the notice which the appellant was bound to take of it. Indeed, the marriage, according to some of the cases, was a nullity, and, upon proper application, would be so declared by the court.

Judgment affirmed.

 No. 7279.

HARLEY, ADMINISTRATOR, v. HEIST.

LIFE INSURANCE.—*Husband and Wife.*—*Assignor and Assignee.*—*Collateral Security.*—*Descent.*—S. took a policy on his life, payable to himself and his assigns, for the benefit of his wife, and paid the premiums until the death of the wife, her husband and two children surviving. S. assigned his

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interest in the policy to H. by endorsement, as security for a debt, and thereafter for several years H. paid the annual premiums, until S. died. *Held*, that on the death of the wife one-third of the policy went to the husband, and two-thirds to the children, subject to the right of her administrator to collect the whole.

Held, also, that the assignment of the husband carried to the assignee only the husband's rights as an heir of his wife.

Held, also, that the assignee was entitled to be refunded out of the proceeds of the policy the amount of premiums paid by him, with interest.

From the Kosciusko Circuit Court.

W. Olds, M. Sickafoose and H. S. Biggs, for appellant.

J. S. Frazer and W. D. Frazer, for appellee.

ZOLLARS, J.—The record in this case presents in different forms the following material facts:

On the 1st day of February, 1867, in consideration of the payment of a premium of \$70.20 by David Snyder, and the same amount thereafter to be paid annually, the Connecticut Mutual Life Insurance Company executed and delivered to said David Snyder a policy of insurance upon his life, in which it agreed to pay \$2,000 upon due proof of his death.

That portion of the policy which is material to the parties in this controversy is as follows: "And the said company do hereby promise and agree with the said assured, his heirs, executors, administrators and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said David Snyder, for the benefit of and payable to Wilhelmina R. Snyder, wife of the said David Snyder, deducting therefrom all notes taken for premiums unpaid at that date. And it is hereby conditioned and agreed, that if at any time after three premiums have been paid on this policy, it shall be surrendered while yet in force, the company will issue a paid-up, non-forfeiture policy therefor, for such an amount as the then present value of this policy would purchase, as a single premium."

The wife, Wilhelmina, died intestate in December, 1869,

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and left surviving her, her husband, David, and their two minor children.

On the 20th day of February, 1871, said David Snyder, being indebted to appellee, assigned the policy to him by endorsing upon it the following:

“COLUMBIA CITY, February 20th, 1871. — *P. v.*

“For value received, I herewith assign my interest to the within policy to Henry Heist. DAVID SNYDER.”

In the month of November, 1874, David Snyder died intestate. Up to the time of the assignment and delivery of the policy to appellee, said David Snyder paid the premiums as stipulated for in the policy. After the assignment, appellee paid the premiums, viz.: On the 24th day of January, 1872, \$48.70; on the 24th day of January, 1873, \$46.20; and on the 24th day of January, 1874, \$46.55.

In 1875, after appellant had been appointed administrator of the estate of said Wilhelmina, the insurance company filed its complaint in the Whitley Circuit Court against the parties to this cause, asking that they be required to set up their respective claims to the policy and the money due thereon.

After appellee had filed his answer and cross complaint, the insurance company, by agreement of the parties, and an order of the court, paid to the clerk \$1,909.73, being the amount due on the policy, less an unpaid premium note, and interest on the same, amounting in all to \$127.68. We are not informed by whom this note was executed.

After this, the venue was changed to the Kosciusko Circuit Court. In that court appellant filed his answer and cross complaint, to each paragraph of which, except the general denial, a demurrer by appellee was sustained, and appellant excepted. The cause was then submitted to the court, and after the finding of facts, and conclusions of law on the same, a judgment was rendered, giving to appellee the full amount of money so paid over by the insurance company, the same not exceeding the amount of the premiums paid by him with in-

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terest, and the amount due him from Snyder for which the policy was assigned. From this judgment appellant appeals.

Was the policy the personal property of the wife Wilhelmina in such a sense that, upon her death, it went to her heirs at law as a part of her estate, or was it upon her death the property of the husband, so that his assignment transferred the legal title to the same to appellee? This is the important question presented by the record, the determination of which, counsel agree, will be decisive of this controversy.

That the policy was personal property, under our statute (2 R. S. 1876, p. 314), we think there can be no question. In consideration of the payment of the annual premiums, it contained a definite and fixed promise to pay a definite and fixed amount of money, upon the happening of an event, which was uncertain in nothing except the time at which it might occur. Such a policy of insurance is a chose in action, governed by the same principles applicable to other agreements involving pecuniary obligations. *Bliss Life Insurance*, 2d ed., p. 540; *Hutson v. Merrifield*, 51 Ind. 24 (19 Am. R. 722).

The policy in this case, by its terms, was executed for the benefit of the wife, and, upon a fair construction, was payable to her, and not to the personal representatives of the husband. Upon its execution, the title vested in the wife, and not in the husband. By the procurement of the husband, the wife became the owner of the policy and entitled to collect the amount that might become due on the same upon the death of the husband. Had the wife procured the policy to be issued, and paid the premiums, no one could doubt as to the ownership of the policy, and the right to collect the money due thereon. We are unable to see, in this case, why there should be any difference in the ownership and title of the policy by reason of the application having been made and premiums paid by the husband. Had the policy been made payable to the husband, he doubtless might have given it to the wife, and, by proper endorsements thereon, conveyed to her the legal title to the same. In such case it would have become her separate

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property, by gift from her husband; and so, too, he had the legal right, in the first instance, to make the application, pay the premiums, and have the policy made payable to the wife for her benefit, and thus vest in her the legal title and ownership of the policy, as her separate property. The title and ownership of the policy being vested in the wife by gift from the husband, it was her separate property, to be disposed of under the statute, which provides that the personal property of the wife, acquired during coverture, by descent, devise, or *gift*, shall remain her own separate property, to the same extent and under the same rules as her real estate so remains, and, on her death before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances. 1 R. S. 1876, p. 412; R. S. 1881, sec. 2488.

Personal property thus acquired by the wife, upon her death, descends to her heirs at law, as does her real estate, except for the purpose of paying debts and costs of administration, the title vests in the administrator, if one be appointed. In this case the policy of insurance, upon the death of the wife Wilhelmina, descended to her heirs at law; the undivided one-third to the husband, David Snyder, and the other two-thirds to the minor children, subject to the rights of the appellant, as the administrator of her estate, who, for the purpose of paying debts and costs of administration, has the right to collect the money due upon the policy, to the exclusion of all others. If there had been no need of administration, and no administrator had been appointed, the heirs at law of the wife might have collected the money. Subject to this right of the administrator, the husband had the legal right to assign his interest in the policy, as he did, to the appellee. Upon such assignment appellee became the owner of, and entitled on distribution to, one-third of the amount due upon the policy, after the payment of debts and costs of administration. . . .

We have carefully examined the cases cited by the learned counsel on either side, besides many others, and, while there

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is some conflict, the conclusions reached by us in this case are in accord with the decided weight of the authorities. In the case of *Hutson v. Merrifield*, 51 Ind. 24, the contest was between the administrator of the husband and the surviving wife. The wife had taken out a policy upon the life of the husband, payable to herself, or, in case of her death, to her children. The premiums were paid by the wife. She died before the husband, and without children. The case was disposed of as though the policy had contained no clause in relation to children. After deciding that the policy was a chose in action, the court say: "If the policy is a chose in action, it is personal property which at the death of the party holding and owning it would vest in the heirs of such person, subject to the payment of debts. That the amount of the policy is not payable until the death of the life insured, can make no difference."

In the case of *Pence v. Makepeace*, 65 Ind. 345, the question arose between the administrator of the assignee of a policy of life insurance, and the widow of the insured. The husband had procured a policy of insurance upon his life, payable to his wife, and paid the premiums. During the lifetime of the husband the policy was assigned as collateral security, and the assignee, before the death of the husband, paid three annual premiums. After the death of the husband, and on the trial of the cause in relation to the money due on the policy, the wife denied that she joined with her husband in the assignment of the policy. The court below had instructed the jury that the policy, being payable to the wife, vested in her alone the absolute ownership of it, and that it could not be assigned or transferred to any one by her husband, or any other person, without her authority. This instruction was held by this court to express the law correctly. See, to the same effect, *Wilburn v. Wilburn*, 83 Ind. 55, and authorities cited.

In *Bliss on Life Insurance*, 2d ed., sec. 318, the author says: "We apprehend the general rule to be that a

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policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. * * * The legal representatives of the insured have no claim upon the money, and can not maintain an action therefor, if it is expressed to be for the benefit of some one else."

In the case of *Keller v. Gaylor*, 40 Conn. 343, a husband had taken a policy upon the life of his wife, payable to himself, or, in case of his death before the wife, to his children. He died before the wife, and without children. Held, that at his death he had a vested interest in the policy, and that, by his will, it went to the wife. See, also, *Chapin v. Fellowes*, 36 Conn. 132 (5 Am. R. 49); *Crittenden v. Phoenix Mutual Life Ins. Co.*, 41 Mich. 442; *Connecticut Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305; *Ruppert v. Union Mutual Ins. Co.*, 7 Rob. (N. Y.) 155.

It is maintained by the learned counsel for appellee, that Snyder, having paid the premium, had the right, after the death of the wife, to omit the payment, and thus let the policy forfeit; and that, to avoid this loss, he had the right to change the beneficiary, or constitute himself such, by the assignment. If the policy was personal property, and the title thereto was vested in the wife, we are unable to understand how the husband, by any act of his, without the consent of the beneficiary, could change the ownership.

The property, under the statute, passed at once upon the death of the wife to her heirs at law, and the husband had no more control over it than before her death. True, he could not have been compelled to pay the premiums, or provide for the payment, but having paid them by himself and his assignee, the policy did not lapse, and the title to and ownership of the same did not change. . . .

In the same edition of Bliss above quoted from, section

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337, the author says: "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the moneys. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of designation can only be made by the person originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur."

In the case of *Chapin v. Fellowes*, 36 Conn. 132, a policy was issued upon the life of the husband, payable to the wife; or, in case of her death, to her children. The wife died before the husband. After her death the husband surrendered the policy and took another for the same amount, the same date, and the same premium, but payable to himself. He paid one year's premium, and died insolvent. In a contest between the children and the husband's creditors, it was held that the husband had no right without the consent of the children thus to surrender the old policy and take the new one, payable to himself; and that the children were entitled to the amount due on the latter policy.

In the case of *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193 (38 Am. R. 289), the husband had procured a policy of insurance upon his life, payable to his wife, or in case of her death, to his children. After the death of the wife, and a remarriage, he surrendered the original policy, and a new one was issued in its place as a substitute therefor, bearing the same date and containing the same terms and conditions, except a provision that it should inure to the sole use and separate benefit of the second wife. Held, that the husband had no right to thus change the policy without the consent of the children, and that they were entitled to the avails of the new policy as against the second wife. It is said by counsel that

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these decisions were made under peculiar statutes, and are therefore not authority in this State. It will be found upon examination that these statutes, where they exist, give to married women no greater rights in policies, or the avails of policies, upon the lives of their husbands, than they have under the laws of this State, except that, in some of the States, no claim of fraud can be made by creditors if the annual premiums paid by the husband do not exceed certain amounts.

It is said further, that to deny to the husband who has paid the premiums the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and wrong. A sufficient answer to this is, that if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy. It was to avoid this so-called wrong, that the Wisconsin court has held that the person procuring the policy may dispose of it without the consent of his nominee. Such a view, we think, is not consistent with legal principles, is in conflict with former rulings of this court, and against the weight of the authorities in the other States.

The appellee, having in good faith paid the premiums since the assignment of the policy, is entitled to have the amount so paid, with interest at six per cent, refunded to him out of the money paid over by the insurance company.

It follows from the conclusion we have reached, that the court below was in error in rendering judgment for appellee, and in its rulings upon demurrers to pleadings. The judgment is therefore reversed, at the costs of appellee, with instructions to the court below to overrule appellee's demurrers to the first, second, fourth, fifth and sixth paragraphs of appellant's answer and cross complaint, to sustain the demurrer to appellee's answer and cross complaint, and to proceed in accordance with this opinion. ✓

Fontaine v. Houston *et al.*

No. 9025.

FONTAINE v. HOUSTON ET AL.

86	205
144	413

DESCENTS.—*Husband and Wife.*—*Conveyance.*—*Consideration.*—*Reversion.*—*Statute Construed.*—Where a husband, in consideration of love and affection, causes his lands to be conveyed to his wife, the whole of such lands, upon her death intestate, seized of the lands and without children, or their descendants, leaving the husband surviving, reverts to him, under section 2473, R. S. 1881, between which and section 2489 there is no conflict.

From the Marion Circuit Court.

C. P. Jacobs, for appellant.

L. Jordan, for appellees.

BICKNELL, C. C.—The plaintiff, in 1875, filed her complaint against Houston and wife, Northrop and wife, and the city of Indianapolis, alleging that, in 1862, she was the owner of one-fourth of the land in controversy, and Charles G. French owned the other three-fourths; that the Indianapolis Building and Loan Association held a mortgage on the land, and, in 1862, foreclosed the same, making the plaintiff a defendant in the foreclosure suit; that the plaintiff was a non-resident, and that the affidavit of publication, as to her, was defective, in failing to show that she was a necessary party to the suit; that the court, therefore, had no jurisdiction as to her, and that she knew nothing of the suit until 1875; that the decree of foreclosure was void as to her, for want of jurisdiction; that, in 1863, the land was sold under said decree to the said building and loan association; that, in July, 1863, said building and loan association reconveyed the land to said Charles G. French, whose title has become vested in the defendants, who are in possession and have been receiving the rents and profits; that, shortly before this suit was brought, the plaintiff offered to redeem said land, and demanded from defendants an accounting as to the rents and profits, which they refused.

The complaint demanded an accounting, and that the plaintiff's equitable interests be ascertained, and that she be permitted to redeem, etc. This complaint was held sufficient on

Fontaine v. Houston *et al.*

demurrer. *Fontaine v. Houston*, 58 Ind. 316. The plaintiff claims one-fourth of the land as the sole surviving parent of Emma C. French, who died seized thereof, without issue, leaving a husband her survivor.

The defendants answered :

1. By a general denial.
2. That Charles G. French was the owner of the property, and, in November, 1858, in order to convey the title to his wife Emma C. French, in consideration of love and affection, conveyed it by quitclaim to J. C. Pomerooy, who, in December, 1858, conveyed it by quitclaim to said Emma; that, prior to these conveyances, French and wife had mortgaged the property, as stated in the complaint; that afterwards said Emma died intestate, without issue, whereby the title was revested in her said husband, who survived her, and that, after her death, the foreclosure proceedings were had, as stated in the complaint; that French afterwards conveyed the property to Shoemaker, who conveyed it to the defendants Houston and Northrop, and they conveyed part of it to the city of Indianapolis.

A demurrer to this second paragraph of answer was overruled; the plaintiff replied in denial; the suit was dismissed as to the city of Indianapolis. A trial by the court resulted in a finding for the defendants. The plaintiff moved for a new trial, alleging,

- 1st. That the finding was not sustained by sufficient evidence.
- 2d. That the finding was contrary to law.

This motion was overruled, judgment was rendered upon the finding, and the plaintiff appealed. The errors assigned are :

1st. Overruling the demurrer to the second paragraph of the answer.

2d. Overruling the motion for a new trial.

Section 7 of the law of descents is as follows :

“An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor if living at the intestate’s death, saving to

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the widow or widower, however, his or her rights therein." 1 R. S. 1876, p. 409.

Section 25 of the same law provides that "If a husband or wife die, intestate, leaving no child, but leaving a father and mother, or either of them, then his or her property, real and personal, shall descend three-fourths to the widow or widower, and one-fourth to the father and mother jointly, or to the survivor of them." 1 R. S. 1876, p. 412.

In support of her demurrer the plaintiff claims that, under the proper construction of these sections, although Charles G. French was a grantor in consideration of love and affection, and although he survived the grantee, who died intestate without issue, yet the land does not revert to him under section 7, but that, under section 25, only three-fourths of the land descends to him, and the other one-fourth descends to the plaintiff as the sole surviving parent of the grantee. No authority is cited for this construction, and we do not adopt it. There is no conflict in sections 7 and 25. Section 7 embraces all cases where there is a grantor in consideration of love and affection. The meaning of the two sections, taken together, is, that, if the wife die intestate, leaving a husband and no child, but a father and mother, or either of them, then the property shall descend three-fourths to the widower, and one-fourth to the father and mother jointly, or the survivor of them; but if the property were conveyed to the intestate by such widower in consideration of love and affection, then the whole of it shall revert to him.

The court below, therefore, did not err in overruling the demurrer to the second paragraph of the answer, and there was no error in overruling the motion for a new trial. The evidence sustained the allegations of the answer, and the finding was not contrary to law. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

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No. 10,633.

STRONG v. STATE.

CRIMINAL LAW.—*Obtaining Money Under False Pretences.—Indictment.—*

Benevolent Society.—An indictment, charging that the defendant, on, etc., at, etc., by falsely pretending to be a member of a certain Masonic lodge in Ohio, that he was on his way to his father-in-law's funeral, and was out of money to travel, and by exhibiting a forged receipt from the Ohio lodge for dues, obtained from M. lodge of Masons a sum of money named, upon a promise to repay the same, with intent to defraud M. lodge, knowing said pretences to be false and the receipt to be forged, is good on motion to quash.

SAME.—Evidence.—Evidence, in such case, that the defendant had, by pretences somewhat similar, at another time and a distant place, defrauded another Masonic lodge, is not admissible. ELLIOTT, J., dissents.

From the Morgan Circuit Court.

A. M. Cunning, for appellant.*F. T. Hord*, Attorney General, *J. D. Alexander*, Prosecuting Attorney, and *W. B. Hord*, for the State.

NIBLACK, J.—This was a prosecution against George E. Strong for obtaining money under false pretences. R. S. 1881, section 2204.

The indictment was in four counts. Motions to quash each count were severally overruled. A jury found the defendant guilty as charged in the first count of the indictment; that he should be fined in the sum of \$10, and be imprisoned in the State's prison for the term of four years. A motion for a new trial being first overruled, judgment was rendered upon the verdict.

The first count of the indictment charged that the defendants, on the 27th day of September, 1881, for the purpose of defrauding Martinsville Lodge No. 74, of Free and Accepted Masons, feloniously, falsely and designedly represented to Jefferson K. Scott, the Worshipful Master, and Enoch M. Woody, the Treasurer, of said lodge, at the county of Morgan, in this State, that he, the defendant, was a member of Mercer Lodge No. 121, of the same order, located at Saint Marys, in the State

86	208
130	537
86	208
147	54
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148	412
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154	137
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169	493

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of Ohio, and, as an evidence that he was a member of said last named lodge, then and there exhibited to the said Scott and Woody a receipt, partly in print and partly in writing, as follows:

“HALL OF MERCER LODGE No. 121, F. & A. M.,
ST. MARYS, O., —, 1879. }

“Received of Bro. George E. Strong for dues from ———,
to ———, 1879, \$7.50. C. H. PHELPS,

“[L. S.] Secretary.”

That the defendant further represented to the said Scott and Woody that his father-in-law had just died at the city of Vincennes, in this State, and that his, the defendant's, wife was then at Vincennes, awaiting his arrival at that place to assist her in taking the remains of his said father-in-law back to said town of St. Marys, in the State of Ohio, for interment; that he, the defendant, was then on his way from St. Marys to Vincennes to join his wife and to assist her as stated; that he was then without money or means to proceed further, and was greatly in need of the sum of \$3.85, to enable him to reach Vincennes; that his wife had with her sufficient money to pay all necessary expenses, and that if said Martinsville Lodge would advance him that sum he would repay the same after reaching Vincennes; that the said Scott, believing said representations to be true and said receipt to be genuine, and relying upon the truth of such representations and the genuineness of such receipt, and being deceived thereby, and having the requisite authority to grant the relief solicited by the defendant, by the use of funds belonging to said Martinsville Lodge, issued an order upon the said Woody, as the treasurer of said lodge, in the following form:

“ MARTINSVILLE, IND., Sept. 27th, 1881.

“E. M. WOODY, Treas. Martinsville Lodge No. 74, F. & A. Masons: You will please pay to the bearer, a travelling brother in distress, \$3.85. JEFF. K. SCOTT, W. M.”

And delivered the same to the defendant, for whose use and

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benefit it was intended; that the defendant thereupon presented said order to the said Woody, who accepted it and paid the amount named therein to the defendant for and on behalf of said Martinsville Lodge; that the defendant was not then a member of said Mercer Lodge No. 121, nor of any other Masonic lodge; that said paper purporting to be a receipt for dues to that lodge, and exhibited to the said Scott and Woody was a false, forged and fraudulent writing; that all the other representations made by the defendant for the purpose of obtaining said money were untrue, and that the defendant well knew that all the representations herein above set forth, as made to the said Scott and Woody, were untrue when he made them.

It is first contended on behalf of the appellant, that the court below erred in overruling his motion to quash this count of the indictment:

First. Because it is not made sufficiently to appear that Scott and Woody relied on his statements as to the existing facts as reasons for letting him have the money he obtained from them, but that the fair inference is, that they relied on his promise to repay the money, which was not a fraudulent representation within the meaning of the statute.

Secondly. Because it was apparent from the facts averred that the money was given to the appellant as a charity merely, and hence in a way that made the representations upon which it was obtained immaterial.

In cases of this kind the false representations must be as to some existing fact, and not as to some promise for the future. 2 Bishop Crim. Law, section 420; *Keller v. State*, 51 Ind. 111; *Bonnell v. State*, 64 Ind. 498; *Perkins v. State*, 67 Ind. 270 (33 Am. R. 89). The representations must also be relied on. 2 Bishop Crim. Law, *supra*, section 462.

We think the count under consideration made it sufficiently obvious that the most material and most important representations made by the appellant were as to facts assumed to be then existing, and that the appellant's promise to repay the

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money was only incidentally made to give a favorable coloring to his representations as to his alleged membership in Mercer Lodge, at St. Marys, in Ohio, and as to the genuineness of the receipt at the time exhibited by him; also, that these last named representations were the ones mainly, if not entirely, relied on by Scott and Woody.

In the case of *People v. Clough*, 17 Wendell, 351, it was held, in an ably written opinion, that an indictment would not lie for obtaining money by false pretences where the money is parted with as a charitable donation, although the pretences moving to the gift were false and fraudulent; but the statute under which that case was decided was less comprehensive than is ours on the subject of false pretences, and the conclusion there reached, considered with reference to the statute of New York then in force, is not in accordance with the weight of authority, and does not, in our estimation, afford a safe precedent even under a statute similar to the one under which that decision was made. A contrary doctrine has been held in England and in Massachusetts. Bishop Crim. Law, *supra*, section 467; *Commonwealth v. Whitcomb*, 107 Mass. 486; *Reg. v. Hensler*, 11 Cox C. C. 570; *Reg. v. Jones*, Temp. & M. 270.

The count before us is very long and very minute in the details of its averments. We have, consequently, only considered it in connection with the objections urged to it at the present hearing. Thus considered, the count appears to us to have been correctly held good upon the motion to quash it in the court below.

Questions are made upon the sufficiency of the other counts of the indictment, but, as the appellant was convicted only upon the first count, this appeal presents no question upon any of the other counts. *Short v. State*, 63 Ind. 376; *Bonnell v. State*, *supra*.

At the trial one Charles H. Phelps was introduced as a witness on the part of the State, and, over the objection of the appellant, testified substantially as follows: "I live at

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St. Marys, Ohio, and belong to Mercer Lodge No. 121, of Free and Accepted Masons; I have seen the defendant before; I was secretary of our lodge during the entire years of 1879 and 1880; I am a physician, and had the blank receipt book and the seal of the lodge in my office. The defendant came to me with a note from Mr. S. Carr, who was then our Worshipful Master; the note said for me to try the defendant in the secret work of Masonry, and, if I found him all right, to pay him \$5, as a travelling brother in distress; I did try him, and was satisfied he was a Mason, and a very bright one; he told me his father-in-law had just died, and that he was on his way to the funeral; that he had run out of money, but that his wife had plenty of money to repay the amount and furnish all necessary expenses after he reached her, and that he would repay the amount I paid him, (which was) \$5, as a travelling brother in distress; this was on June 21st, 1880, at St. Marys, in the State of Ohio; he stayed in my office quite a good while, and was there while I was out; I did not give him any blank receipt whatever, and did not sign my name to any paper, or give him or put the seal of the lodge on any paper for him; he never paid the \$5 back. * * * * *

He then said he was a member of Federal Lodge No. 1, Washington, D. C., and that he was in the Government employ as a postoffice detective."

The witness further testified that he had been for a long time a member of Mercer Lodge No. 121, above referred to by him, and that the appellant was not then and had never been a member of that lodge, and that he had never signed, nor authorized to be signed, his name to the receipt exhibited by the appellant to Scott and Woody; that a blank receipt was torn out of his receipt book some time between June 17th, 1880, and the 10th day of the succeeding August, and that while the appellant was alone in his, witness's, office, he had ample opportunity to fill up and put the seal of Mercer Lodge upon one of the blank receipts in his, witness's, receipt book.

It is in the next place contended, on behalf of the appellant,

that the court erred in permitting Phelps to testify as above to the fact that the appellant had likewise obtained money from him, and to the pretences upon, and the circumstances under, which the money was obtained, and that, for that reason, a new trial ought to have been granted.

We find it difficult to deduce from the text-writers and decided cases any well defined rule which will enable us to determine when proof of the perpetration of, or of the attempt to perpetrate, a similar offence is admissible as evidence of the intention with which the crime charged was committed.

The intention with which a particular act is done constitutes often the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon his trial. For the purpose, therefore, of proving the intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from the like mental condition. Bishop, in his work on Criminal Procedure, after giving various illustrations as to the proper application of this rule in criminal practice, sums up his conclusion in the following words:

“It is, that, though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet, whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible; and it is also admissible, if it really tends thus, as in the facts of most cases it does not, to prove the act itself.”

1 Bishop Crim. Proced., section 1067.

Wharton, in his treatise on Criminal Evidence, referring to the same subject, says:

“In connection with the last exception are to be noticed cases in which, a party's intention being in issue, acts of a similar character are admissible. * * * * *

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“It is essential, however, that such evidence, if admitted, should be simply to prove intent, and not to prove character, or establish a substantive and independent crime. Thus, in 1861, in Massachusetts, a new trial was granted in a case of embezzlement, where evidence of distinct acts of fraud was admitted, but where it did not appear that such evidence was limited by the judge, in his instructions to the jury, to the question of intent.” Wharton Crim. Ev., section 46.

Roscoe's Criminal Evidence states the rule to be that there are cases in which evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under enquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This can not be done merely with the view of inducing the jury to believe that because the prisoner has committed a crime on one occasion he is likely to have committed a similar offence on another, but only by way of anticipation of an obvious defence, such as that the prisoner did the act charged against him without any guilty knowledge.

That author continuing, at page 92, says: “There are three classes of offences in which, from the nature of the offence itself, the necessity for this species of evidence is so frequently necessary that they will be considered separately; these are conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods. In these the act itself which is the subject of enquiry is almost always of an equivocal kind, and from which *malus animus* can not, as in crimes of violence, be presumed; and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions.”

From these authorities, and others of like import which might be cited if deemed necessary, it appears to us to be fairly inferable that where the intent with which an alleged offence was committed is equivocal, and such intent becomes an issue at the trial, proof of the commission of other similar

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offences, within certain reasonable limits, is admissible, as tending to throw light upon the intentions of the accused in doing the act complained of; but that where, from the nature of the offence under enquiry, proof of its commission as charged carries with it the evident implication of a criminal intent, evidence of the perpetration, or attempted perpetration, of other like offences will not be admitted.

In the case at bar the representations charged to have been made by the appellant to Scott and Woody were concerning matters peculiarly within the appellant's knowledge, and, when proven to have been made, and to have been falsely made, as the evidence fully tended to prove, the inevitable inference was that such representations were made with a criminal intent and for a fraudulent purpose. The intent, therefore, with which the appellant made the representations charged against him, was not an issue at the trial in the sense in which Wharton, *supra*, speaks of the intent as sometimes becoming an issue. Consequently, the testimony of Phelps, tending to show that the appellant had at another place committed an offence similar to the one for which he was then on trial, was erroneously admitted, and a new trial ought, for that reason, to have been granted. *Corbin v. Flack*, 19 Ind. 459; *Todd v. State*, 31 Ind. 515; *Fletcher v. State*, 49 Ind. 124 (19 Am. R. 673).

The judgment is reversed and the cause remanded for a new trial. The clerk will give the necessary notice for a return of the prisoner to the custody of the sheriff of Morgan county.

DISSENTING OPINION.

ELLIOTT, J.—I agree that the general rule is that it is not competent in a prosecution for one offence to give evidence of another distinct and independent crime; but, while this is the general rule, there are exceptions to it as firmly settled and as generally recognized as the rule itself. The prosecution is never denied the right to give evidence otherwise competent, upon the ground that it tends to prove

another offence. It is my conviction that the evidence given by the State in the present case was competent, even upon the concession that it involved proof of a distinct offence committed at a different time from that charged in the indictment.

It was unquestionably proper for the State to prove that the token used by the accused was a false one, and this could be done by proving the manner in which it was procured. The act of procuring the false receipt from the secretary of the Ohio lodge was an essential matter of evidence, and, where it is competent to prove an act it is always competent to prove conduct and declarations accompanying the act. I do not understand the rule to restrict the doctrine of *res gestæ* to evidence of declarations accompanying the immediate act constituting the crime, but that it extends to conduct and declarations connected with an act which is a material part of the offence, whether it relates to malice, knowledge, or intent. Wherever it is competent for the prosecution to prove an act, it is proper to prove the declarations made at the time the act was done, and forming part of the same transaction. I affirm, therefore, that as it was competent for the prosecution to prove the procurement of the receipt and impression of the seal of the Ohio lodge, it was proper to prove what was said and done at the time by the accused.

I think the evidence competent on another ground, and that is, that all that was said and done was necessary in order to enable the jury to judge of the credibility of the testimony of Phelps. Without the conduct and declarations of the accused it might have seemed very improbable that he would leave an entire stranger in possession of his office, with access to important books and papers; whereas, with all the declarations and the whole conduct of the accused before the jury, the witness' testimony became probable and consistent.

But I think there is a broader ground upon which the competency of the testimony can be established. It was essential for the State to show guilty knowledge and a criminal intent to practice deception upon others. A recent writer says: "So

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it seems that the guilty knowledge of the falsehood of a pretence may be shown by evidence of a previous obtaining or attempting to obtain by false pretences." Harris Crim. Law, 369. The case of *Regina v. Francis*, L. R., 2 C. C. R. 128, is directly in point. That was a prosecution for attempting to obtain money by a false pretence, and the reporter's note thus shows the point reserved: "Evidence was then offered, in order to prove guilty knowledge in Francis, that he had shortly before offered other false articles to other pawnbrokers. The learned judge admitted the evidence, but as the cases relied on by the prosecution were all cases either of forgery or uttering counterfeit coin, he reserved the question whether on such a charge as this such evidence was admissible for the purpose of proving guilty knowledge." The evidence was held by a unanimous court, and upon full argument, to be competent, Lord COLERIDGE, C. J., saying: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under mistake, evidence of the class received must be admissible. It tends to shew that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake." In the very recent case of *Tarbox v. State*, 9 Cincinnati Law Bulletin 24, the defendant was indicted for obtaining money by a false pretence, and it was held by the Supreme Court of Ohio that it was proper to show a similar offence in Detroit, Michigan, the court saying: "The decisions are uniform to the effect that, where *scienter* is an element of the crime charged, previous offences necessarily involving such guilty knowledge are admissible." The court cited the cases of *Farrer v. State*, 2 Ohio St. 54; *Bainbridge v. State*, 30 Ohio St. 264; *Shriedley v. State*, 23 Ohio St. 130. Wharton says: "Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious in-

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tention, is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime." 1 Whart. Crim. Law, section 649. Professor Greenleaf lays down a like rule, and says: "The like evidence of acts and declarations at other times, in proof of the character and intent of the principal fact charged, has been admitted in trials for arson, robbery, libel, malicious mischief, forgery, conspiracy, and other crimes." 3 Greenl. Ev., section 15. In the case of *Regina v. Richardson*, 2 F. & F. 343, evidence of other acts of embezzlement than the one charged was held admissible, the court saying: "I am clearly of opinion that this evidence is admissible. There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offences." Still stronger is the case of *Reg. v. Geering*, 18 L. J. Mag. Cas. 215, where, in a prosecution for murder of a husband by a wife, evidence that other members of her family had died from poisoning in a manner similar to that of the husband, was held competent. Our own cases apply the general rule to prosecutions for uttering counterfeit money. *McCartney v. State*, 3 Ind. 353; *Bersch v. State*, 13 Ind. 434. The first of these cases is directly in point as to the admissibility of the declarations made at the time of doing another act. The court, in stating the points made, said: "Whether the court erred in permitting proof of what the defendant said at the time of passing each of said notes, in regard to it. There was no error in this. His declarations were a part of the *res gestæ*." It is firmly settled that in civil cases, where notice or knowledge is an essential element of the issue, evidence of other acts is admissible although constituting distinct causes of action in favor of different persons. *Wooley v. Grand Street, etc., R. R. Co.*, 83 N. Y. 121; *Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294 (10 Am. R. 111); *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98). And as said by Lord COLERIDGE,

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"The law of evidence is the same in criminal and civil suits."
Regina v. Francis, supra.

The case before us is stronger than any I have cited, for the acts and conduct of the accused were connected with the fraudulent procurement of the form of the instrument afterwards moulded into the false token which enabled him to perpetrate the crime charged against him.

I think the reason of the rule applies with peculiar force to a case, such as this, of an impostor who goes about the country imposing upon others by a systematic scheme, of which the particular act is but one of a long series of like criminal acts performed in the execution of a formed and continuous design to defraud communities.

No. 10,078.

HALL, ADMINISTRATOR, v. STANLEY.

EVIDENCE.—*Claim.*—*Decedents' Estates.*—In an action against an estate for services rendered in boarding, caring for and waiting upon the decedent, by a cripple who moved about upon his hands and knees, it is not error to prove that he had been seen splitting rails, for the purpose of showing his ability to render the services in dispute.

BILL OF EXCEPTIONS.—*Time of Filing.*—*Record.*—A bill of exceptions filed after the term, without any statement in the record other than such as is found in the bill, that time was given, is not a part of the record.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not disturb a judgment upon the mere weight of the evidence.

From the Henry Circuit Court.

J. Brown and W. A. Brown, for appellant.

J. H. Mellett and E. H. Bundy, for appellee.

BEST, C.—The appellee filed a claim against the estate of Thomas Stanley, deceased, to recover \$2,400 for services alleged to have been rendered by himself and wife in nursing, board-

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ing, caring for and waiting upon the decedent from 1873 to 1881. After the claim was transferred to the issue docket, the appellant filed an answer of denial and a set-off, alleging that the appellee was indebted to the decedent in the sum of \$1,500 for like services rendered by the decedent for the appellee during said time. The issues were tried by a jury, and a verdict of \$800 returned for the appellee. A motion for a new trial was overruled and judgment was rendered upon the verdict.

The error assigned is that the court erred in overruling the motion for a new trial. This motion embraced many reasons, but only two of them are mentioned in the appellant's brief, and the others will not be noticed. The first reason mentioned is that the verdict was not sustained by sufficient evidence. Upon examination we find that there was evidence tending to support the verdict, and, under these circumstances, we can not disturb the judgment upon the mere weight of the evidence, as has often been decided by this court. *Butterfield v. Trittipso*, 67 Ind. 338, and authorities cited.

The next reason mentioned is that the court erred in permitting Lewis Myers to testify that he had seen the appellee splitting rails. The objection to this testimony was that it was irrelevant and immaterial, and that the appellee was not entitled to recover for such services in this action. The appellee was a cripple, compelled to move about upon his hands and knees, and this testimony was offered and admitted for the purpose of showing that he possessed the ability to render the services for which the claim was filed—the court informing the jury at the time that it was only admitted for such purpose. There was, we think, no error in the admission of this testimony, under the direction given. The appellee's physical disability would probably create the impression that he was unable to render a portion of the services for which he claimed compensation, and it was, therefore, proper to enlighten the jury upon this matter. If this fact did not create such impression the testimony was unnecessary and immaterial. If unnecessary it was harmless, and, under the direc-

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tion of the court, could not injure the appellant. There was, therefore, no error in the admission of this testimony.

This much has been said upon the assumption that the evidence is in the record. The bill of exceptions embodying it was filed after the term, and there is no statement in the record that time was given within which to file the bill, other than such as is found in the bill itself. It has been held that this is not sufficient. *Nye v. Lewis*, 65 Ind. 326.

For these reasons we are of opinion that there is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

No. 9277.

BALDWIN ET AL. v. BRICKER.

PROMISSORY NOTE.—*Defence by One who Negligently Signs.*—One who is guilty of negligence in the execution of a promissory note can not defend against it in the hands of a *bona fide* holder who obtains it for value, before maturity and without notice.

SAME.—*What Constitutes Negligence.*—It is in general true that a man who does not read, or cause to be read to him, an instrument which he signs, is guilty of negligence; but there may be peculiar cases where such a failure is not negligence, and where the signer may rely on the representations of the person with whom he deals.

PRACTICE.—*Instructions.*—Unless the instructions given by the court are all in the record, no question will be presented on the refusal to give instructions asked by the parties.

SAME.—*Argument of Counsel.*—It is the duty of counsel to take the facts from the evidence, and not to place facts not proved by or inferable from the evidence before the jury.

SAME.—*Reading of Extracts from Books.—Illustration.*—It is not proper for counsel to read extracts from books or newspapers; but, for the sole purpose of illustrating an argument, a printed slip of paper may, in some cases, be used. In the absence of a contrary showing, the presumptions are in favor of the conduct of the trial court.

From the Putnam Circuit Court.

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165	88
165	232
165	235

Baldwin *et al.* v. Bricker.

W. M. Ridpath, S. W. Curtis and E. S. Holliday, for appellants.

ELLIOTT, J.—The instructions given by the court below are not in the record, and in their absence we can not say that there was any error in refusing or modifying those asked by the appellants. *Puett v. Beard, ante*, p. 104.

The evidence shows that the appellee executed the note in suit, and that it came to the hands of the appellants at such a time and in such a manner as to constitute them *bona fide* holders, and to entitle them to full protection as such. It also shows that the appellee could not read, and that the payees of the note induced him by fraudulent representations to believe that he was signing an order for medicines, and not a promissory note.

The rule is firmly settled by our cases, as well as by the great weight of authority elsewhere, that one who negligently signs a promissory note negotiable by the law merchant, can not defend against it in the hands of a *bona fide* holder, although it was obtained from him by fraud and without yielding him the slightest consideration. But where there is no negligence, and a person signs a note in the belief, induced by fraudulent practices, that it is an instrument of an altogether different character, it is invalid, even in the hands of a *bona fide* holder. A man who can not read must necessarily repose confidence in those with whom he deals, and, if they falsely read an instrument to him, he is not to be deemed negligent simply from the fact that he trusts them and signs the paper upon the faith of the information thus furnished him. It may be that an illiterate man who is unable to read will, in some cases, be guilty of negligence in not having the paper read to him by one whom he knows to be disinterested; but whether he is so or not must generally be a question for the jury. Mr. Daniel, in speaking of this class of cases, says: "But in all such cases the question of negligence is difficult of legal solution, and no absolute invariable rule can well be laid

down. If the paper be ostensibly read to one who can not himself read, it is still to him a matter that must rest on faith; and if he takes due precaution to ascertain its true character, it would be a great hardship to inflict responsibility upon him which he did not intend to assume. And what is due precaution must be determined by the peculiar circumstances of each case." 1 Dan. Neg. Inst., sec. 849. This is substantially the doctrine of our case of *Webb v. Corbin*, 78 Ind. 403. We can not say that the jury, under the very peculiar circumstances developed by the evidence, erred in the case before us in deciding that the appellee was not negligent.

Complaint is made of the conduct of counsel in the argument of the cause to the jury. The bill of exceptions shows that the appellee's counsel read as part of his argument, and for the purpose of illustrating it, a slip cut from a newspaper containing the form of a promissory note calling for \$10, and then, by folding it in a peculiar manner, showed that it assumed the form of a note for \$279; and the bill also shows that the counsel commented upon the note read from the slip, but what his comments were is not stated.

It is unquestionably true that counsel, in their argument, must take the facts from the record, and have no right to place before the jury any other facts than such as the evidence directly or by fair inference tends to establish. The argument can not assume the form of testimony. This rule forbids reading to the jury from books or newspapers any statements of facts, and also prohibits the introduction of any extracts from such sources, as evidence. The rule that matters gathered from books or newspapers can not be used as testimony does not, however, prohibit counsel from using quotations as mere illustrations. It is said in a recent article upon the argument of counsel that, "Albeit, he is confined to the record for his facts, history, prophecy, literature, and the sciences are open to him for example or illustration." 3 Crim. Law Mag. 619, 632; 14 Cent. Law J. 406. If, in the case before us, the counsel had written the paper which he used for the purpose of illustra-

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tion, it would scarcely be contended that it was improper for him to make use of it for the purpose of illustrating the manner in which a man not used to business might be imposed upon and induced to believe he was signing one instrument, when in fact he was actually signing one of an altogether different character.

It is not proper, however, to permit counsel to read newspaper comments upon the case on trial, nor upon facts connected with it, nor upon like matters. In short, extracts can only be used for the mere purposes of illustration, and never as statements of facts, or as the expressions of opinion, nor can they be used under color of illustration when they contain statements of facts or expressions of opinion concerning the particular case in hearing, or cases of like character. Thompson & M. Juries, sec. 351, authorities in note; *Insurance Co. v. Cheever*, 36 Ohio St. 201 (38 Am. R. 573).

The record does not inform us what comments were made by counsel upon the slip used by him, and we must presume that they were such as it was proper for him to make. Presumptions are always in favor of the conduct of the trial court, and, in the absence of a showing to the contrary, it must be presumed that comments made by counsel upon a thing used by him by way of illustration were legitimate and proper.

Judgment affirmed.

86	224
124	356
86	224
130	630
86	224
148	548

No. 9592.

HUFFMAN v. COPELAND ET AL.

PRACTICE.—*Failure of Party to Submit to Examination.*—*Striking out of Pleadings.*—*Witness.*—No question is presented upon the refusal of the circuit court to strike out a party's pleadings because of a failure to submit to examination, under section 510, R. S. 1881, unless the record shows that a good excuse for the failure was not offered.

Huffman v. Copeland et al.

FRAUDULENT CONVEYANCE.—*Husband and Wife.—Contract.—Consideration.*

—*Partnership.*—A husband and wife and a third person did business as partners, agreeing to share profits equally; money of the wife was used in the business; large profits were made, but the husband having overdrawn his share, his debt to the firm was, by agreement of all the partners, charged to his wife's account, and in consideration of this adjustment he executed to her an agreement to convey to her, or to their daughter, certain real estate, and afterwards, being insolvent and indebted to plaintiff, conveyed to the daughter.

Held, that the agreement to convey rested upon a valuable executed consideration, and the conveyance made was valid as against the creditors of the grantor.

JUDGMENT.—*Lien of.—Assignor and Assignee.*—A judgment lien attaches to the precise interest which the debtor has in real estate, and no more, except that a good-faith purchaser and assignee of a judgment is protected (in this State) against secret equities inconsistent with the recorded title of the debtor.

From the Marion Circuit Court.

D. V. Burns, C. S. Denny, J. R. Wilson and J. L. Wilson,
for appellant.

N. B. Taylor, F. Rand and E. Taylor, for appellees.

WOODS, C. J.—Action by the appellant to set aside as fraudulent a conveyance of real estate made by the appellees Joshua W. and Margaret B. Copeland to their daughter, the appellee Margaret B. Copeland, Jr.

The first question presented in the case is one of practice, and arises upon the motion of the appellant to have the answer of the defendant Margaret, Jr., struck from the files, because of her failure to appear according to notice given her and her co-defendants, for examination, as a party, before the trial, as provided in section 296 of the code of 1852. R. S. 1881, sec. 510. The record shows a notice signed by the attorneys of the appellant, requiring the said Margaret, Jr., to appear at a time and place specified, for her examination, and her failure to appear. The return of the sheriff upon this notice shows a service upon the defendants, all by reading, and upon the said Margaret, Jr., by copy also, more than five days

Huffman v. Copeland *et al.*

before the day appointed for the examination. The record does not show explicitly whether any reason or excuse was offered for the failure of the party to appear as required by the notice. Counsel for the appellee now claim that the action of the court below must be upheld:

1st. Because, the contrary not being shown, it must be presumed that a good excuse for the failure to obey the notice was shown.

2d. Because the notice was not properly served, in this: that a copy of the notice should have been left with each of the defendants, as well as with the one whom it was proposed to examine.

3d. That the service of a summons issued by the officer before whom the examination was to be had, or an order of court, was necessary to compel the attendance of the party, or to put her in contempt for failure to attend.

Deciding nothing upon the second and third propositions, we deem the first good. The statute is that a "party refusing to attend and testify, * * may be punished as for a contempt; and his complaint, answer, or reply may be stricken out." R. S. 1881, sec. 513.

The next point to be considered goes to the merits of the case. The question is presented in several ways in the record whether the conveyance in dispute was made upon a valuable consideration. If it was, it must stand, but, if not, the appellant ought to prevail.

It is conceded that the grantee paid nothing, but it is insisted that her mother paid a full and valuable consideration. If so, it was as follows:

In 1868 Joshua and Margaret Copeland, being husband and wife, had been for some years in partnership in the millinery business, Mrs. Copeland having put \$1,000 of her own money into the business; they then took Charles Annan into the firm, upon an agreement that each partner should have one-third of the profits of the business. Large profits accrued, and, the said Joshua having overdrawn his share thereof

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to the amount of \$8,140, it was agreed between the partners that said sum should be credited on the books of the firm to said Joshua, and charged over to the account of Mrs. Copeland; and accordingly, on the 22d day of February, 1875, the credit to Copeland and the charge against Mrs. Copeland were entered on the books, and at the same time the said Joshua, in consideration of the premises, executed to Mrs. Copeland a writing, whereby he agreed to convey the property in controversy to her, or to their daughter when she should become of age; and, in fulfilment of this agreement, the said Joshua and wife did, on the 13th day of October, 1879, sign, acknowledge and cause to be recorded the conveyance in question, and, after the recording thereof, the said Joshua placed the same in the hands of Mrs. Copeland for the said Margaret, Jr., and the same was delivered to and accepted by her "in the forepart of April, 1880." The plaintiff recovered a judgment in the superior court of Marion county, where the property is situate, on the 15th day of April, 1880, against said Joshua, upon a contract made on the 23d day of August, 1879. The partnership aforesaid was wound up in July, 1878. Mrs. Copeland drew therefrom from time to time sums aggregating \$22,500, which she invested in property in her own name.

Counsel for appellant, in their brief, say: "The appellant insists that a husband and wife could not be partners in a mercantile business, and the husband was entitled to all of the profits, and, therefore, the \$8,000 of profits, which was the consideration of the deed, was the husband's money; or, if it be held that the husband relinquished to his wife such profits, the relinquishment was not executed and completed till long after he was indebted to the plaintiff, and, therefore, the deed is invalid as to the plaintiff."

It is doubtless true that the wife had no power to bind herself by the contract of partnership, or to incur any personal liability as a partner in the business; nevertheless, it was competent for the husband and other partner, after his admission to the firm, to permit her to share in the business, which, in

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part, was carried on with her separate means; and whatever may have been the rights of partnership creditors, if there were any, we perceive no ground upon which the individual creditor of the husband can claim that the transaction worked a legal injury to him, or upon which such creditor may dispute her right to her share of the profits; and when she consented to the charging to her account of the overdraft of her husband, and this was done by the act and consent of the partners, it afforded a sufficient executed consideration for the contract to convey. We think the contract, therefore, ought to be upheld as against the appellant.

It may be suggested that the contract may be deemed to have an element of consideration in the fact that Annan was a party to the agreement on which it was based. As a member of the firm, he might have insisted that Joshua Copeland should repay what he had overdrawn, instead of the debt being cancelled as it was and the assets of the concern thereby diminished. In this view it can not be said, if otherwise it might be, that the agreement to convey the land rested upon a division, between husband and wife alone, of profits which the husband might lawfully have taken as his own. There was in the transaction a surrender by a third person of an important right; one, at least, which may have been important.

Judgment affirmed.

ON PETITION FOR A REHEARING.

WOODS, C. J.—A rehearing is asked because it was not decided “whether the deed was delivered to the appellee Margaret, Jr., prior to the rendition of appellant’s judgment,” nor “the effect thereof in case it was not so delivered.”

When the conclusion was reached that the contract for the conveyance rested upon a valuable consideration, and was therefore valid and binding, it became immaterial whether or not there was a delivery of the deed before the rendition of the judgment. The contract having been made and the consideration paid or executed, a conveyance under the contract

The Lake Erie and Western Railway Company v. Everett, Administrator.

could not be defeated by the lien of a judgment subsequently rendered. The general rule is that the lien of a judgment, when it attaches to a parcel of property, becomes a charge upon the precise interest which the judgment debtor has, and no other; and "The attaching of the lien upon the legal title forms no impediment to the assertion of all equities previously existing over the property." Freeman Judgments, sections 356-7. The rule has been so far modified in this State as to protect the good-faith purchaser and assignee of a judgment lien against secret, unknown and unrecorded equities; inconsistent with the judgment debtor's recorded title. *Flanders v. O'Brien*, 46 Ind. 284; *Busenbarke v. Ramey*, 53 Ind. 499; *Wainwright v. Flanders*, 64 Ind. 306; *Armstrong v. Fearnaw*, 67 Ind. 429; *Tuttle v. Churchman*, 74 Ind. 311.

Upon the evidence in respect to the delivery of the deed, if the case depended on that, the verdict could not be disturbed.

Petition overruled.

No. 9867.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY v.
EVERETT, ADMINISTRATOR.

SUPREME COURT.—*Evidence.*—*Verdict.*—Where there is some evidence tending to support a verdict, and the verdict is supported by the action of the trial court in overruling a motion for a new trial, the Supreme Court will not disturb the judgment on the insufficiency of the evidence to sustain the verdict.

From the Carroll Circuit Court.

H. W. Chase, F. S. Chase and F. W. Chase, for appellant.
F. B. Everett, for appellee.

BLACK, C.—This cause was commenced in the Tippecanoe

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Superior Court, whence, upon change of venue, it went to the Carroll Circuit Court.

It was an action by the appellee, administrator of the estate of Madison P. Bennett, deceased, to recover damages of the appellant because of the death of said Bennett, resulting from an injury received by him while employed as a switchman in appellant's yard at Lafayette, and when he was engaged in the line of his duty and under the direction of his immediate superior, in coupling two freight cars, the injury being occasioned by reason of the defective construction and condition of the draw-bar and bumper of one of said cars, whereby said draw-bar and bumper had too much lateral motion, so that the draw-bars and bumpers of said cars, instead of abutting together, passed each other, and said switchman, in undertaking to couple said cars, was, without his fault, struck by the draw-bar and bumper of one of the cars and driven against the end and head timbers of the other car.

There was an answer of general denial; and the cause was tried by a jury, by whom a special verdict was returned in favor of the appellee. A motion made by appellant for a new trial was overruled, and this ruling alone is assigned as error. There is no dispute as to any question of law. The only question which this court is asked to decide is whether the verdict was sustained by sufficient evidence.

There was evidence tending to support the verdict. As to some of the facts found there was contradictory testimony; but this court can not, upon such ground, interfere with the conclusion of the jury, supported by the action of the trial court in overruling a motion for a new trial.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be, and it hereby is, affirmed, at the costs of appellant.

Holman v. Elliott *et al.*

No. 9415.

HOLMAN v. ELLIOTT ET AL.

86	231
182	88

REAL ESTATE.—Action to Recover.—Possession Admitted by Appearance and Pleading.—By appearing and pleading to a complaint for the recovery of real estate, though by the general denial, a defendant admits for the purposes of the action his possession of the property.

SAME.—Disclaimer.—Practice.—Judgment.—In such an action a defendant may disclaim as to all or as to any part of the lands sought to be recovered, but if he join his co-defendants in a general denial of the complaint, he must stand or fall by the issue, and if the plaintiff prevails in respect to any part of the lands in question, he is entitled to judgment against such defendant though he had not in fact claimed or had possession of the land recovered.

SUPREME COURT.—Special Verdict.—Evidence.—In determining whether or not the proper judgment was rendered upon a special verdict, the Supreme Court can not consider the evidence.

From the Decatur Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.

WOODS, C. J.—This case is here, as once before, upon an exception to the conclusion and judgment of the court upon a special verdict. See *Holman v. Elliott*, 65 Ind. 78. Since the taking of this appeal the death of Sanford Elliott, the appellee, has been suggested, and the names of his heirs at law have been substituted. Dallas S. Holman alone appeals, his co-defendants Derringer having disclaimed any interest, and Rowland W. and Cornet J. Holman having declined to join in the appeal.

The action was in ejectment, the complaint being in the usual form, for the recovery of six tracts of real estate, of which the defendants are alleged to have had and held wrongful possession. The defendants Holmans joined in a plea of general denial.

The finding shows that on and prior to the 1st day of August, 1867, Jesse L. Holman, the father of the defendants, was the owner in fee simple of four tracts of land described in the complaint, which, on the 19th day of the same month and

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year, he conveyed to his sons Rowland and Cornet, two tracts to one, and two to the other, and on the same day conveyed the other two tracts described in the complaint to the appellant, Dallas; and that these conveyances were made with the intent, on the part of the grantor and grantees, to cheat, hinder and delay the creditors of the grantor, and especially for the purpose of cheating the plaintiff, the said Jesse L. Holman not retaining and having sufficient other property subject to sale on execution for the payment of his debts; that, on the 14th of August, 1867, the said Sanford Elliott had commenced an action against said Jesse L. Holman and John and Henry Yater, wherein, on the 27th day of the same month and year he recovered a judgment against the said defendants for the sum of \$1,827.03, and costs, upon which, on October 10th, 1867, execution was issued, and the said John and Henry Yater being then, as at the date of the judgment, insolvent, the execution was levied upon some of the lands described in the complaint, and by virtue of the levy so made the said lands were afterwards sold and conveyed by the sheriff to the said Sanford Elliott.

For the purpose of disposing of this appeal the foregoing is a sufficient statement of the verdict.

“The defendants, each separately for themselves and together,” moved “for a judgment for costs against the plaintiff” upon this verdict, and saved an exception to the adverse ruling; and thereupon, on motion of the plaintiff, the court gave judgment in his favor for the recovery of all the lands described in the complaint, to which ruling and judgment the defendants excepted.

The appellant insists that the verdict does not support a judgment against him, because it does not show that Jesse L. Holman was the owner or had title to the two tracts of land conveyed to him, and consequently fails to show that the plaintiff, who could recover only on the strength of his own title, had, by virtue of his purchase at the sheriff's sale, acquired

Holman v. Elliott *et al.*

title. If this construction of the finding be conceded, it does not avail the appellant.

By appearing and pleading to the action, though by a denial, the defendants admitted that at the commencement of the suit they were each and all in possession of all the lands sought to be recovered. R. S. 1881, sec. 1056; *Applegate v. Doe*, 2 Ind. 169; *Voltz v. Newbert*, 17 Ind. 187; *Rucker v. Steelman*, 73 Ind. 396. This admission is not, even if it could have been, affected by anything stated in the verdict. The fact that on the 19th day of August, 1867, Jesse L. Holman had conveyed two parcels to the appellant was not proof, and tended with no certainty to show what part or interest he claimed when the suit was brought; and as the burden of proof was not on the plaintiff in this respect, the silence of the verdict on the point does not impair his right of recovery. *Graham v. State, ex rel.*, 66 Ind. 386; *Jones v. Baird*, 76 Ind. 164. It follows, notwithstanding the appellant's objections, the plaintiff had a right to judgment against all the defendants Holmans for the recovery of four of the tracts of land in dispute, together with the costs of suit. If the appellant had desired to present the question whether or not upon the facts found there could be a recovery of the two tracts conveyed to him, he, or he and his co-defendants, should have moved for judgment against the plaintiff in respect to those tracts, or should have excepted specially to the judgment in favor of the plaintiff in so far as it affected or included them. The objections made and the exceptions shown by the record do not raise the question. The rule has been often declared that particular objections to judgments not wholly wrong must be pointed out, else the objection will be deemed to have been waived. *Merritt v. Pearson*, 76 Ind. 44, and cases cited.

Judgment affirmed, with costs.

ON PETITION FOR A REHEARING.

WOODS, C. J.—Counsel for the appellant call attention to

sections 596, 597, 600 and 606 of the code of 1852, under which the trial was had, and insist that it is not true that the appellant, by appearing and pleading the general denial, admitted possession by him of all the lands sought to be recovered, and consequently that the plaintiff was entitled to judgment against him for costs and for the recovery of such portions of the land as were found to belong to the plaintiff.

We adhere to the proposition as stated in the opinion. There is nothing in it inconsistent with the statutory provisions referred to, which are, in substance, that, under an answer of general denial to a complaint for the recovery of real estate, the defendant may "give in evidence every defence to the action that he may have, either legal or equitable;" that "When the defendant makes defence, it shall not be necessary to prove him in possession of the premises;" that "Where there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against one or more of the defendants, the premises, or any part thereof, or any interest therein, * * but the recovery shall not be for a greater interest than that claimed;" and that "The plaintiff must recover on the strength of his own title."

It may be observed that in section 613 it is provided that by disclaiming any interest or estate in the property, or by suffering judgment to be taken against him without answer, "the defendant shall recover costs."

If, instead of making common cause with other defendants, and putting the plaintiff upon proof of his title to all of the lands, *as against him*, the appellant had disclaimed any interest in the four tracts, and confined his denial to the two tracts which were conveyed to him, he would have been entitled to a decision whether, upon the facts found, the appellee was entitled to recover those two tracts; but, by denying the entire complaint, he joined issue with the plaintiff in respect to all the lands sought to be recovered; and, it being shown that the plaintiff was entitled to recover a part of the land, he was entitled to recover it of the appellant, whose possession was ad-

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mitted or put beyond dispute, just as if he had been the sole defendant, or as if he alone had pleaded the denial. In a proper case, judgment will be rendered for or against one of two or more plaintiffs or defendants; but the defendant who would avail himself of that rule must be careful not to make or join others in making issues which he can not fully sustain.

If the judgment extends to property not described in the complaint, it is perhaps a void and harmless error; but in any event an exception to that part of the judgment, or to the overruling of a motion to strike it out, was necessary to present the question on appeal. *Merritt v. Pearson, supra.*

There are some other matters in the argument upon the petition in reference to points not presented in the original brief, but if considered they could not change the result. When considering the judgment upon a special verdict, references to the evidence are not permissible. *Shaffer v. Ryan*, 84 Ind. 140.

Petition overruled.

No. 9611.

THE CITY OF CONNERSVILLE v. THE CONNERSVILLE HYDRAULIC COMPANY.

86	235
152	61
152	76
86	235
159	70

PLEADING.—*City Warrant.*—*Taxes.*—*Demurrer.*—Where, in an action upon a city order by the holder, the city answers, by way of set-off, that he is indebted to the city for taxes in a certain sum, but fails to allege any facts showing his or his property's liability to taxation, or the city's authority to levy and collect taxes, such answer is insufficient on demurrer.

SAME.—*Contract.*—*Consideration.*—A city order on its treasurer for the payment of money is a contract; and, in an action thereon by the holder, a plea of want of consideration is good.

SAME.—*Uncertainty.*—*Demurrer.*—*Practice.*—Uncertainty, as a rule, is not a cause for demurrer, but where the pleading is so vague as not to state a cause of action or ground of defence, a demurrer will lie.

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SAME.—Joint Demurrer.—A demurrer addressed to several paragraphs jointly of a pleading must be overruled, if any one of the paragraphs is sufficient.

From the Fayette Circuit Court.

R. Conner, W. C. Forrey and R. A. Duman, for appellant.

B. F. Claypool, J. H. Claypool and L. W. Florea, for appellee.

ELLIOTT, J.—Many of the questions presented by this record were decided in the case, between the same parties, of *City of Connersville v. Connersville Hydraulic Co.*, ante, p. 184, but there are some questions which were not considered in the former case.

The complaint of the appellee is founded upon a warrant signed by the mayor and clerk and issued by order of the common council of the city of Connersville, and, among the answers of the city, is one claiming a set-off for taxes. This answer is bad for uncertainty, or, more accurately speaking, because it states mere conclusions and not facts. It alleges that the appellee is indebted to the appellant for taxes, in the sum of \$1,000, but does not state by whom or for what purpose the taxes were levied; nor does it state on what property they were assessed, or when assessed. The general conclusion stated is wholly unsupported by facts. In a case such as this, where the claim rests upon a mere naked statutory power, there should be some facts stated showing the liability of the party or his property to taxation, the authority to levy the taxes, and the right to enforce their collection.

Uncertainty is not, as a general rule, cause of demurrer; but there are cases where the pleading is so vague as not to state a cause of action or ground of defence, and, in such cases, a demurrer will lie. *Lewis v. Edwards*, 44 Ind. 333; *Lane v. Miller*, 27 Ind. 534; *Snowden v. Wilas*, 19 Ind. 10. It has been held that where there is no specific statement of the claim in the body of the pleading, and a bill of particulars is necessary to apprise the adverse party of the nature of the claim

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alleged against him, a bill of particulars must be filed, or the pleading will be bad on demurrer. *Wolf v. Schofield*, 38 Ind. 175. While the rule in favor of pleadings assailed by demurrer on the ground of uncertainty is a liberal one, it does not, by any means, go to the extent of dispensing with reasonable certainty. This the rule could not do without contravening the express provisions of the code and subverting settled principles of law.

The form of the appellee's demurrer to the fourth and fifth paragraphs of the answer is exactly like that adopted in *Silvers v. Junction R. R. Co.*, 43 Ind. 435, and, upon the authority of that case, must be deemed a joint demurrer to both paragraphs. The fourth paragraph of the answer is a plea of want of consideration, and is unquestionably good. An ordinary corporation warrant is a contract, and the plea of want of consideration is good in all cases between the original parties, where the cause of action is founded on a contract. It was, therefore, error to sustain the demurrer to either the fourth or the fifth paragraph of the answer; for the rule has been long and firmly settled that a joint demurrer addressed to several paragraphs jointly of a pleading must be overruled if any one of the paragraphs is sufficient. *Jewett v. Honey Creek, etc., Co.*, 39 Ind. 245; *Washington Tp. v. Bonney*, 45 Ind. 77; 1 Works Prac. 345, authorities in note.

Judgment reversed.

 No. 9090.

ROGERS, ADMINISTRATOR, v. ZOOK ET AL.

COMMON LAW.—*Presumption.*—*Foreign State.*—Where the transaction, which is the subject of the action, is governed by the laws of the State of *West Virginia*, and no statute of that State is pleaded or given in evidence, it will be presumed that the common law is the law of such State and governs the transaction.

86	237
134	420

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DECEDENTS' ESTATES.—Promissory Note.—Assignor and Assignee.—Powers of Administrator.—At common law, an executor or administrator had the same property in, and the same powers over, the personal estate and effects of his decedent, that such decedent had at and before his death; and where an administrator barter and assigns promissory notes belonging to his decedent's estate, the assignee thereof would, under the common law, take a good and valid title to such notes as against any subsequent administrator, heir at law or creditor of the decedent.

ENDORSEMENT OR ASSIGNMENT.—Devastavit.—In this State an executor or administrator may endorse or assign promissory notes, due or payable to his decedent, so as to vest the title thereto in the assignee; but where the executor or administrator barter and assigns promissory notes belonging to his decedent's estate for his own private purposes, to an assignee with notice, such transfer is simply a *devastavit* of such estate; and, in such case, any one who, with notice, participates in the *devastavit*, will be liable for its full amount to any creditor, subsequent administrator or heir at law of the decedent.

From the Huntington Circuit Court.

J. C. Branyan, C. W. Watkins and M. L. Spencer, for appellant.

B. M. Cobb and B. F. Ibach, for appellees.

Howk, J.—The appellant, as administrator of the estate of Benjamin Marks, deceased, brought this action to foreclose a certain mortgage alleged to have been executed to the decedent in his lifetime by the appellee Martin L. Zook, on certain real estate in Huntington county. Emeline Zook, the wife of Martin L., was made a defendant to the action. The appellees jointly answered in two paragraphs, of which the first was a general denial, and the second stated special matters as a defence to the action. The appellant's demurrer, for the want of sufficient facts, to the second paragraph of answer, was overruled by the court, and to this decision he excepted. He then replied to the second paragraph of answer by a general denial thereof. The issues joined were tried by a jury, and a general verdict was returned for the appellees; and with their general verdict the jury also returned their special findings upon the particular questions of fact submitted to them by the appellant, under the direction of the court. The

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appellant's motion for a new trial having been overruled, and his exception saved to such ruling, the court rendered judgment, in accordance with the verdict, that he take nothing by his suit herein, and that the appellees recover of him their costs in this action expended.

The appellant has assigned as errors the decisions of the circuit court (1) in overruling his demurrer to the second paragraph of appellees' answer, and (2) in overruling his motion for a new trial; while the appellees claim, by way of cross error, that the court erred in not carrying back the demurrer to the second paragraph of answer and sustaining the same to the appellant's complaint.

We will first consider and dispose of the alleged cross error.

In his complaint the appellant alleged in substance, that he was the administrator of the estate of Benjamin Marks, deceased; that, on the 11th day of April, 1866, the appellee, Martin L. Zook, executed to the decedent, then a resident of the State of Indiana, six promissory notes of that date, each for \$200, payable respectively in two, three, four, five, six and seven years from date, and that to secure the payment of said notes, which were given for a balance of the purchase-money of the real estate thereafter described, the appellee Martin L. Zook, who was the husband of his co-appellee, Emeline Zook, then and there executed to the decedent a mortgage on said real estate in these words and figures, to wit (copy of mortgage), which said mortgage was duly recorded in the recorder's office of said Huntington county.

And appellant further averred, that before any of said notes became due, the decedent removed to the State of West Virginia, and there, shortly thereafter, died intestate, having at the time the title to and possession of all said notes and mortgage, and having heirs in said Huntington county, and the said credits due him in said county; that one Benjamin J. Marks, the decedent's son, took out letters of administration in the State of West Virginia, and partly administered on the decedent's estate, but fraudulently failed to pay over or ac-

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count for the said notes in any way whatever, and fraudulently converted them to his own use and bartered them away without authority from any one so to do of competent authority, and appropriated the proceeds thereof to his own use, and failed to file any report of the proceeds thereof or pay the same over to any one entitled thereto; that the appellee Martin L. Zook, with notice that the said Marks had no authority from the heirs of the estate to collect or deal with said notes and mortgage, and over their objection and protest, did deal with said Benjamin J. Marks, and with one Jane Swartz, who pretended to own three of the said notes by assignment of said Marks, as such administrator, and did fraudulently take said notes from the said parties, and cause said Jane Swartz to pretend to cancel said mortgage and to mutilate the record of said mortgage, by writing on the margin of such record the following words and figures, to wit: "March 8th, 1870. I assign the within mortgage, the last three notes due, amounting to six hundred dollars, to Jane Swartz, the wife of Samuel B. Swartz; assigned by Benjamin J. Marks, the administrator of Benjamin Marks, deceased." The above endorsement on the original mortgage, recorded April 19th, 1870. "Received payment in full on this mortgage April 19th, 1870." (Signed) "Jane Swartz, assignee of B. J. Marks, administrator of B. Marks, deceased." And the appellant said that he could not set out copies of the said notes, nor describe them more particularly, because they were in appellees' possession; but he averred that all of said notes were due him, as the administrator of the estate of Benjamin Marks, deceased, and were unpaid to him or to any one authorized to receive any part thereof. Wherefore, etc.

We are of the opinion that the appellant's complaint did not state facts sufficient to constitute a cause of action in favor of the appellant and against the appellees, on the notes and mortgage in suit. On the contrary, we think that the complaint itself shows that the notes had been fully paid, and the mortgage fully satisfied, nearly ten years before the com-

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mencement of this action. The complaint showed that before any of the notes became due the payee and mortgagee removed from this State to the State of West Virginia, where he died shortly afterwards, and where his son, Benjamin J. Marks, was appointed administrator of his estate; and it was shown that the appellees had paid off and taken up all of the said notes, having paid the last three of the notes to one Jane Swartz, to whom they and the mortgage had been assigned by such administrator. It is averred that the administrator fraudulently converted the notes to his own use, and bartered them away, and fraudulently converted the proceeds thereof to his own use; but it was not averred that the appellees, or either of them, before their payment of the notes, had notice of either the fraudulent conduct of the administrator, or that he had bartered away the notes and fraudulently converted the proceeds to his own use. The only fact, of which it was alleged that the appellees had notice before the payment of the notes, was that the administrator had no authority from the heirs of the estate to collect or deal with the notes. This notice was a vain formality, because the administrator did not need any authority from the heirs of the decedent to enable him to collect, assign or transfer the decedent's notes.

In the case at bar, it must be assumed that the power of the administrator of Benjamin Marks, deceased, over the notes in suit, was governed and controlled by the law in force in the State of West Virginia. It was not alleged in the complaint that the administrator's power over his decedent's estate is regulated or restricted by any statute of that State; and, therefore, it must be presumed that the common law prevails in that State, and that the administrator possessed the power conferred by the common law, over the assets of his decedent's estate. *Schurman v. Marley*, 29 Ind. 458; *Alford v. Baker*, 53 Ind. 279; *Patterson v. Carrell*, 60 Ind. 128.

In *Weyer v. Second National Bank of Franklin*, 57 Ind. 198, it was said: "At common law, an executor or administrator

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had the same property in, and, of course, the same powers over, the personal effects or estate of his decedent, that such decedent had at and before his death. In *Whale v. Booth*, 4 T. R. 625, note *a*, Lord MANSFIELD, C. J., said: 'The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they can not be followed by the testator's creditors.' " If they can not be followed by creditors, much less can they be followed, as it seems to us, by an administrator *de bonis non*, or by heirs at law. After administration has been granted it is said, in 2 Williams Executors, 6th Am. ed., p. 992, "the power of an administrator is equal to, and with, the power of an executor." With this plenary power over the assets of his decedent's estate, at the common law, it would seem that, if the administrator of Benjamin Marks, deceased, had bartered away and assigned the appellees' notes and mortgage to Jane Swartz for his own use and purposes, she would have taken a good and valid title to such notes and mortgage, as against any subsequent administrator, heir at law, or even creditor, of such decedent. It would seem, also, in such case, that if the appellees, with actual notice of such barter and assignment for such use and purpose, had paid such assignee the amount of the notes, they could not have been compelled to repay the same by any subsequent administrator, heir at law or creditor of the decedent.

It has often been held by this court that an executor or administrator may transfer, by his assignment, promissory notes due and payable to his decedent, so as to vest the title thereto in his assignee. *Thomas v. Reister*, 3 Ind. 369; *Hamrick v. Craven*, 39 Ind. 241; *Thomasson v. Brown*, 43 Ind. 203; *Krutz v. Stewart*, 76 Ind. 9. In the case now before us it was not alleged that the notes and mortgage were brought into this State and here bartered and assigned to Jane Swartz, by the first administrator of the payee and mortgagee thereof. In the absence of such an allegation, it must be assumed, we think, as was elsewhere shown to be the fact, that such alleged barter

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and assignment of the notes and mortgage were so made in the State of West Virginia; where, as we have seen, it must be presumed, for the want of an averment to the contrary, that the common law prevailed and governed the transaction. Where the administrator of a decedent's estate barter away notes held by him in his fiduciary capacity, and assigns the same in this State for his own private purposes, or without consideration enuring to the benefit of his decedent's estate, it has been held by this court, and correctly so we think, that such transfer of the notes, as between the administrator and his assignee with notice (and the notice might be inferred from the nature of the transaction), would be simply a *devastavit* of the decedent's estate. In such case not only the administrator and his assignee, but any one who with notice participated in the *devastavit*, would be liable for the full amount thereof to any creditor of the decedent, subsequent administrator or other person interested in the due administration of the estate, and injured by the *devastavit*. *Thomasson v. Brown, supra*; *Fleece v. Jones*, 71 Ind. 340; *Krutz v. Stewart, supra*.

Conceding that it is shown by the averments of the appellant's complaint that the first administrator of his decedent, without authority of law therefor, bartered and assigned the notes in suit to Jane Swartz, for his own uses and purposes, it would still seem to us that the complaint is radically defective, in this, that it fails to show that Jane Swartz had notice, at the time she purchased and took an assignment of the notes and mortgage, of any fraudulent intent or purpose of the administrator, or that he was transcending the power conferred on him by law. Nor was it alleged in the complaint that the appellees, or either of them, had any notice whatever, actual or constructive, at or before the time they paid off the notes and procured the satisfaction of the mortgage, that Jane Swartz had acquired title thereto, by means of a barter therefor with the first administrator, for his own uses and purposes, or that there was any defect of any kind in her title to the notes and mortgage. There was nothing alleged in the complaint which

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impeached or called in question the absolute good faith of the appellees, in their payment of the notes in suit.

Our conclusion is that the demurrer to the second paragraph of the answer, as it searched the record, ought to have been carried back and sustained by the court to appellant's complaint, for the want of sufficient facts therein to constitute a cause of action.

We need not, therefore, consider or decide any of the questions arising under either of the errors assigned by the appellant, as the judgment below must be affirmed, in any event, for the want of a sufficient cause of action.

NOTE.—It is shown by an affidavit annexed to the record that, after the appeal was taken in this cause, but before its submission in this court, the appellee Martin L. Zook died intestate, leaving his co-appellee, Emeline Zook, his widow, (who had been appointed his administrator) and several named children, as his heirs at law, who have been made parties to this appeal. For the sake of brevity, we have used the names of the original parties in the foregoing opinion; but the judgment of this court is rendered in favor and in the names of the heirs and representative of Martin L. Zook, deceased.

The judgment is affirmed, with costs.

 No. 9903.

WILSON v. MOORE ET AL.

WILL.—Legacy.—Devisees.—Real Estate.—Lien.—Possession.—Devisees of land are not liable to an action for a legacy charged thereon until they have taken possession. Until then it is not due.

SAME.—Election.—Widow.—Where it does not clearly appear from a will that the provision made for the widow was intended to be additional to her interest in her husband's lands, she must elect whether she will take under the will. Such election is a privilege to be exercised by the widow alone. Lapse of time will not affect her right to take under the law.

86	244
145	666

88	244
165	312

86	244
171	368
171	369

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SAME.—Pleading.—An allegation that a widow has not elected to take under the will is not equivalent to an allegation that she has elected not to take under the will, and has taken under the law.

From the Sullivan Circuit Court.

S. Coulson, for appellant.

J. T. Gunn, *G. W. Buff* and *J. B. Patten*, for appellees.

FRANKLIN, C.—Appellant, as assignee of a legatee, brought suit against appellees, as devisees, to recover a judgment for the legacy, and to have it declared a lien upon the real estate devised; and the principal question presented is as to whether the legacy was due at the time of the commencement of the suit. The complaint is in one paragraph, to which a demurrer was sustained, and upon which ruling error has been assigned. The complaint avers that the widow had not elected to take under the will, and that the devisees were in possession of the real estate, claiming to be the owners thereof; that the testator died on the 13th day of March, 1878. This suit was commenced on the 7th day of April, 1881, and the ruling upon the demurrer was made April 21st, 1881. The heirs and widow are all made parties defendants to the suit.

The will, in some respects, is rather peculiar. After the introductory part, it reads as follows: "My will is, that all my just debts and funeral expenses shall, by my executors hereinafter named, be paid out of my estate as soon after my decease as shall by them be found convenient. I give, devise and bequeath to my beloved wife, Letha Burton, during her natural life, all my household and kitchen furniture, together with all my other personal property, and all my real estate of which I die seized, except an acre of land, with house and stable, where my beloved son Porter Burton lives. This land and its appurtenances I want my son Porter Burton to have as long as he is willing to live on it; but if he moves off of said land, then said land and its appurtenances fall back and are part and parcel of the old farm again.

"And I further will, that after my beloved wife Letha Bur-

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ton's death all my real estate, except as heretofore provided, is to be equally divided among my children hereinafter named: Jane Moore, Lucy Burton and Jesse F. Burton; and I further will that said Jane Moore, Lucy Burton and Jesse F. Burton shall pay to Mille Ann Pugh, Martha Vanhorn, Porter Burton and Fidelia Armstrong \$100 each.

"And I further will that my son Jesse F. Burton, and son-in-law James M. Moore, shall rent my farm and have control of said farm from year to year; and for the use of said farm and its appurtenances they shall support me and my wife as long as we live, and they shall also pay us one-third rent of all grains that are raised upon said farm, and all rents are to be put in cribs or granary." Then this son and son-in-law are appointed executors.

This last provision of the will is anomalous, in that it requires this provision to take effect and be enforced in the lifetime of the testator, and continued to be enforced as long as he or his wife shall live.

But we think the intention of the will is obvious; that the testator intended to provide for a comfortable support from the farm for him and his wife so long as they should live, and, if he should die first, the same should enure to the benefit of his wife so long as she should live; that the said Moore and his son Jesse F., who were appointed his executors, should have charge of the farm and carry out the trust; that at the death of both of them the farm should go to said Jane, Lucy and Jesse F., and that they should pay to his other children \$100 each. The payment of the legacies is connected with the division of the farm equally between the devisees, and that is not to take place until the widow's death, when the same shall be freed from the encumbrance of her life interest, to have the rents and profits paid to her. We think this tends strongly to show that the testator intended the legacies to be due when the remainder estate was relieved of the encumbrance. If this be correct, what effect does the allegation in the complaint have, that the widow has not elected

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to take under the will, although more than one year had elapsed since the death of the testator?

Section 41 of the law of descent, 1 R. S. 1876, which is the 2505th section of the R. S. 1881, reads as follows: "If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall make her election whether she will take the lands so devised, or the provision so made; or whether she will retain the right to one-third of the land of her late husband; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed, in addition to her rights in the lands of her husband."

This election by the widow is a personal privilege that she alone can exercise; it can not be done by her guardian or her heirs. *Heavenridge v. Nelson*, 56 Ind. 90; *Eltzroth v. Binford*, 71 Ind. 455.

Where the will makes provision for the widow in lands or money, or any thing else, and it is not expressed to be in lieu of her right in the lands of her husband, and it does not clearly appear by the will to have been the intention of the testator that she should have both, she must in such case elect whether she will take under the will. *Young v. Pickens*, 49 Ind. 23.

In the case of *Smith v. Baldwin*, 2 Ind. 404, it was held that the widow should elect, and, where the will is not explicit as to whether such provision is intended to be in lieu of the provisions of the law, it will be presumed to be so intended, and the widow can not assert her rights under the law without electing as to the provisions under the will.

In the case of *Piercy v. Percy*, 19 Ind. 467, it was held that, in the absence of any statute fixing the time within which she shall make her election, the widow may make the same at any time, and lapse of time will not affect her right to take under the law.

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In the case of *Leach v. Prebster*, 39 Ind. 492, it was said: "There is no time fixed by our statute within which a widow is required to elect whether she will take under the statute or the will. In the absence of an election to take under the will, the widow will be entitled to take under the statute."

In the case of *Wetherill v. Harris*, 67 Ind. 452-473, it was held that "if the husband shall have left a will, the wife may elect to take under the will or by the law; but, as this case is silent as to the widow's election, it must be presumed that she holds by law, and not under the will."

In the case at bar, it is not alleged that the widow holds under either the will or the statute, but that "said defendants now claim said land in fee, under said will, and are in possession thereof."

The allegation, that the "widow has not elected to take under the provisions thereof," is not equivalent to saying that she has elected not to take under the will, and has taken under the statute. So far as the allegations of the complaint inform us, there has no election yet been made by the widow, and as it is a personal privilege that she alone can exercise, and no limit is placed upon the time in which she may exercise it, she yet has the option to make such election, and we can not regard her non-action as affecting the time when the legacies should be due and payable.

If the widow takes under the law one-third in fee, and relinquishes all claim under the will, then from that time until her death, the rents and profits of the other two-thirds are undisposed of by the will, because the devisees of the remainder estate can not take freed from the encumbrance until the death of the widow, and then only the two-thirds of the real estate devised, the other third having been changed into a fee in the widow, and will be inherited from her if not previously willed or otherwise disposed of by her. In either event we do not see how the widow's election can affect the time for the legacies falling due.

The rents and profits of the two-thirds between the time

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that the widow takes under the law and her death, not having been disposed of by the will, would be inherited by the heirs of the testator. *Armstrong v. Berreman*, 13 Ind. 422; *Rusing v. Rusing*, 25 Ind. 63; *Lindsay v. Lindsay*, 47 Ind. 283; *Dale v. Bartley*, 58 Ind. 101. The case of *Lindsay v. Lindsay*, *supra*, is somewhat similar to the case under consideration, and it was held in that case that a devisee who had accepted real estate devised to him was personally liable for the payment of the legacies exclusively charged thereon. See authorities cited in support thereof, and the case of *Burch v. Burch*, 52 Ind. 136. In the case at bar the devisees could not accept and take possession of the estate willed to them until the death of the widow, and could not, before acceptance, be liable to pay the legacies charged thereon. If they held possession during the lifetime of the widow, in case of her non-election, it could only be as her tenants; in case of her taking under the law, it could only be as tenants in common with appellant's assignor and the other heirs. *Lindsay v. Lindsay*, *supra*. And, in no view that we can take of the case, does it appear that it was the intention of the testator that the legacies should be due until the devisees took possession of the remainder estate under the will; and, according to the terms of the will, that could not be done, and the land willed could not be divided, until the death of the widow, and the legacies could not become due until an acceptance of the provisions of the will by the devisees after the death of the widow. We think the legacy claimed by appellant as assignee of Mille Ann Pugh was not due at the date of the commencement of this suit.

The court below did not err in sustaining the demurrer to the complaint. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

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No. 8859.

SCHMIED v. FRANK.

PROMISSORY NOTE.—Endorser and Endorsee.—Endorser's Liability.—Pleading.

—In a suit by the endorsee against the endorser of a promissory note, an averment in the complaint that the maker of the note was, when it was assigned, and still is, "wholly insolvent, having no property subject to execution," sufficiently shows that a suit against the maker would have been fruitless, and was needless to charge the assignor.

SAME.—Diligence.—Parol Agreement.—Evidence.—Mortgage.—Foreclosure Sale.

—*Value.*—A parol agreement and direction by the assignor, at the time of assigning a promissory note, that the assignee shall not sue the maker until requested, that the assignor would stand liable as such without suit until he gave notice to sue, is not void; it does not vary the effect of the written endorsement, but merely fixes the degree of diligence required of the assignee to hold the assignor, and in a suit against the assignee is admissible in evidence, if alleged in the complaint; and, in such case, evidence by the assignee that land mortgaged to secure the note, which, on foreclosure not promptly obtained, sold for \$1, was at the time of the assignment worth enough to satisfy the note and all older liens, is not admissible, and the sum realized by the sale must be taken as the value when sold.

SAME.—Evidence of Insolvency.—Harmless Error.—In a suit by the endorsee against the endorser of a note, evidence of reputation to prove the maker's insolvency is not admissible; but, if admitted, the error is harmless, where such insolvency is distinctly shown by proper evidence, without any opposing testimony.

SAME.—Measure of Damages.—The measure of damages, in a suit by the endorsee against the endorser of a promissory note, not negotiable by the law merchant, is the amount paid for the note with interest, and not the amount of the note itself.

HUSBAND AND WIFE.—Agency.—Witness.—Evidence.—Confidential Communications.—The conversations between husband and wife, whereby she constitutes him her agent to transact her business, are not confidential communications within the meaning of section 497, R. S. 1881, and either is a competent witness to prove them.

From the Switzerland Circuit Court.

J. D. Works and *J. A. Works*, for appellant.

W. D. Ward and *T. Livings*, for appellee.

MORRIS, C.—The appellee sued the appellant, as the endorser of a note, executed by James P. Schmied to the ap-

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pellant, and by him sold and transferred to the appellee by endorsement.

The complaint contains three paragraphs. The first alleges the making and transfer of the note by the appellant to the appellee. It also avers that the note was sold and endorsed to the appellee after it became due; "that said James P. Schmied then was and still is wholly insolvent, having no property subject to execution." A copy of the note and the endorsement is filed with and as part of this paragraph.

The second paragraph is like the first, except that it states, in addition to the facts stated in the first, that the appellant directed the appellee, at the time he endorsed the note to her, not to sue said note until notified by him to do so; and that it was agreed at the time between the appellant and the appellee, that the former, who claimed to be worth \$20,000, would stand as endorser on said note without suit and execution, until he wanted to be released, when he was to notify the appellee to sue the maker; that he waived all diligence on the part of the appellee, and has never at any time notified her to sue the maker of the note.

It is further stated that the maker of the note and his wife, at the time the note was executed, executed a mortgage on certain real estate to the appellant to secure the note; that the mortgagors afterwards sold and conveyed the land so mortgaged to one Daniel Essman; that the appellee had foreclosed said mortgage, and bought in the mortgaged premises at sheriff's sale for \$1; that she recovered judgment against the maker of the note, in the action brought to foreclose said mortgage, for \$584.16, and costs; that execution had been issued on said judgment, and returned wholly unsatisfied; that she had paid costs in said action to the amount of \$46.94; that the appellant had notice of said suit against the maker of the note and others; that the maker of the note had claimed all the property he was possessed of as exempt from execution, had filed proper schedules, and that the property had been duly appraised and set off to him as exempt from execu-

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tion by the sheriff, who had said execution so issued on said judgment.

The third paragraph of the complaint sets forth the same facts stated in the second, in somewhat greater detail; in substance the paragraphs are the same.

The appellant demurred separately to each paragraph of the complaint. The demurrers were overruled. The appellant answered the complaint by a general denial. The cause was submitted to a jury for trial, who returned a verdict for the appellee.

The appellant moved the court for a new trial for the following reasons:

1. Because the verdict is not sustained by sufficient evidence.
2. Because the verdict is contrary to law.
3. Because the damages are excessive.
4. Because the jury erred in assessing the amount of the plaintiff's recovery.
5. The court erred in refusing to allow the defendant to prove by James P. Schmied the value of the real estate upon which the mortgage was given to secure the note, the endorsement of which is sued on in this action.
6. The court erred in allowing the plaintiff to introduce in evidence the record, etc., of the foreclosure suit mentioned in the complaint.
7. The court erred in allowing the plaintiff to prove that the said James P. Schmied was reputed to be insolvent.
8. The court erred in refusing instructions asked by appellant.
9. The court erred in giving instruction one, asked by the plaintiff.
10. The court erred in giving instruction one on its own motion.
11. The court erred in allowing the deposition of Benjamin F. Frank to be read in evidence by the plaintiff.

The motion for a new trial was overruled by the court, and judgment rendered for the appellee. The rulings of the court

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upon the demurrers and upon the motion for a new trial are assigned as errors.

The appellant contends that the first paragraph of the complaint is bad, because it fails to show that proper diligence had been used by the appellee to collect the note from the maker; that the averment that the maker "then, was and still is wholly insolvent, having no property subject to execution," is not sufficient to excuse the appellee from proceeding with due diligence against the maker. The appellant says that, "to excuse the suing of the maker, he must have been 'open and notoriously insolvent' at the time suit should have been brought against him."

The statement of any facts which show that a suit against the maker must have been unavailing will excuse the endorsee from suing the maker. "Open and notorious insolvency" is deemed equivalent to actual insolvency, and it is for this reason that such an averment is held to be sufficient. The averment of any other facts which show actual insolvency will be sufficient. Here it is alleged that the maker was wholly insolvent, and had no property subject to execution. This averment rendered a suit against the maker of the note unnecessary, in order to charge the endorser. *Reynolds v. Jones*, 19 Ind. 123; *Bernitz v. Stratford*, 22 Ind. 320. It is only where the maker has property subject to execution that a suit is necessary.

The word "then," as used in the complaint, refers to the time of the transfer of the note. The averment is, in effect, that the maker was, at the time the appellant endorsed the note, and still is, wholly insolvent, having no property subject to execution. This is equivalent to an allegation that the maker was continuously, from the time of the making of the endorsement to the commencement of the suit, totally insolvent and without property subject to execution. The averment was amply sufficient as an excuse for not suing the maker of the note. There was no error in overruling the demurrer to the first paragraph of the complaint.

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Nor did the court err in overruling the demurrers to the second and third paragraphs of the complaint. It is alleged in both of these paragraphs, that the appellant agreed with the appellee, at the time he made the endorsement, that the note should not be sued on until requested by him. It is also averred in each that the maker of the note was insolvent, that judgment had been recovered against him on the note, execution issued, and returned unsatisfied.

The appellant insists that the agreement waiving suit against the maker was made contemporaneously with the written endorsement; that it was in contradiction of the written contract, and therefore void. Upon this question the authorities are not agreed; some of the earlier cases holding that parol evidence was inadmissible to establish such waiver. The great weight of authority is, however, the other way. Parsons says, in speaking upon the subject:

"Some of the earlier cases deny its admissibility, on the ground that the indorsement is a written contract that regular demand shall be made and notice given, which can not be waived by a contemporaneous parol agreement. But we do not think this to be law, and are of opinion that the evidence may be introduced, because the contract is, not that demand shall be made and notice given, but that due diligence shall be used; and evidence is admissible to prove that such diligence has been used." 1 Parsons Notes and Bills, 584 *et seq.*; *Barclay v. Weaver*, 19 Pa. St. 396; *Boyd v. Cleveland*, 4 Pick. 525; *Taunton Bank v. Richardson*, 5 Pick. 436; *Fuller v. McDonald*, 8 Greenl. 213 (23 Am. Dec. 499); *Drinkwater v. Tebbetts*, 17 Maine, 16; *Lane v. Steward*, 20 Maine, 98; *Edwards v. Tandy*, 36 N. H. 540; *Farmers' Bank v. Waples' Ex'r*, 4 Harrington (Del.) 429. These cases fully sustain the case of *Pollard v. Brown*, 57 Ind. 232.

Daniel says: "It is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the proposition that a parol * * agreement between the parties that payment should not be demanded until after ma-

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turity, is admissible to prove a waiver of demand and notice. Such evidence is not offered for the purpose of varying the written contract of endorsement, which is simply to pay the note after the exercise of due diligence against the maker, but to show that the parties have between themselves settled the amount of diligence to be required." 2 Daniel Neg. Inst. 1093. Authorities upon this point might be multiplied indefinitely. It is hardly worth while to say that there is no conflict between these cases and that of *Stack v. Beach*, 74 Ind. 571 (39 Am. R. 113) and the class of cases supporting it.

The appellant also contends that, as the note was secured by mortgage, it was the duty of the appellee to proceed to foreclose the mortgage within a reasonable time, and with due diligence. But if the agreement (see p. 8) set forth in the second and third paragraphs of the complaint was valid, it relieved the appellee from the duty of instituting any proceedings for the collection of the note, until required so to do by the appellant.

The appellant insists that the court erred in excluding evidence offered by him as to the value of the land mortgaged to secure the note. The appellee had shown that the mortgage had been foreclosed and the land sold at sheriff's sale for \$1. The appellant offered to prove that the land mortgaged was worth, at the time the note was endorsed, \$4,000, and that it was worth \$1,000 over and above encumbrances. The offered testimony was excluded by the court. The appellant insists that, as the appellee failed to use due diligence, the offered testimony should have been admitted; that the appellee was liable for the value of the security at the time the endorsement was made, or when the mortgage should have been foreclosed. But the uncontradicted testimony in the case showed that, by the agreement of the parties, the appellee was under no obligation to foreclose the mortgage sooner than she did. The amount for which the land sold must be regarded as its true value at the time it was sold. *Markel v. Evans*, 47 Ind. 326.

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The court allowed the appellee to prove, over the objection of the appellant, that the maker of the note was reputed to be insolvent at the time the note was endorsed and thereafter. This was error. But, as the maker himself testified to his insolvency, and there was no opposing testimony offered or given in the cause, the error was harmless. The admission of the improper evidence could not injure the appellant, nor would its exclusion have changed the result.

The appellant asked the court to instruct the jury as follows :

“ If the note endorsed by the defendant was secured by mortgage on real estate, and the value of the real estate was such that the money could have been made out of the property, then the fact that the maker of the note was insolvent would not excuse the plaintiff from using due diligence in collecting the money by foreclosure of the mortgage.”

In view of the evidence in the case, the court did not err in refusing to give this instruction. If the appellant had authorized delay in foreclosing the mortgage, then the instruction should not have been given. Benjamin F. Frank, the husband of the appellee, testified that the appellant wished to sell him the note in 1875 ; that he refused to buy it ; told the appellant that his wife, the appellee, had some money that she wished to put out ; that she would not buy the note, because the maker was worthless, and the land mortgaged was not worth the purchase-money due on it ; that Essman was also worthless ; that finally the appellant said he was worth \$20,000 ; “ that I need not be afraid to buy the note, as I would hold him for it ; I told him that if he would stand on the note I would purchase it at a fair price ; he said he would do it, but did not want me to bring suit on it soon, for he would have to pay it himself ; that if the Dutchman, the purchaser of the mortgaged premises, had time he knew he would pay it, and that he was not afraid to risk him ; I then talked to my wife about the trade, and she told me to purchase it if I thought it safe ; I told her I considered Charles Schmied

• Schmied v. Frank.

perfectly good ; I then purchased the note, made a discount equal to 12 per cent. interest on it for the first year ; appellant did not want me to sue on it, for he knew he would have it to pay until the Dutchman was able to pay it."

There was no other or further testimony as to the circumstances attending the purchase of the note. The statements of the appellant, thus made, at the time the note was endorsed, authorized the delay of which he now complains, and justified the court in refusing to give the instruction asked.

The court, at the instance of the appellee, gave the following instruction to the jury :

"The mortgaged property having been sold for \$1 at sheriff's sale, as proven by the sheriff's return introduced in evidence in this case, you must find that the property was worth but \$1, and you can not go back of that sale to find its value."

As the evidence as to the amount for which the mortgaged premises sold consisted alone of the sheriff's return, there was no error in giving the above instruction. *Markel v. Evans*, 47 Ind. 326.

The appellant also insists that the court erred in overruling his motion to suppress the deposition of Benjamin F. Frank, the substance of which we have already stated. We think it appears from the deposition that the witness was acting for, and as the agent of, his wife, the appellee, in the purchase of said note, and that this was understood by the appellant. The statements made by the appellant to the witness had the same force and effect as if made to the appellee herself. Nor do we think the statements made by the witness to his wife, nor by her to him, in regard to the purchase, were confidential communications within the meaning of the statute, and therefore incompetent. The court did not err in overruling the motion to suppress the deposition.

The deposition of the appellee was also objected to by the appellant.

In answer to a question of her counsel, she stated that she

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had authorized her husband, Benjamin F. Frank, to purchase for her the note in controversy. The question and answer were objected to on the ground that the answer disclosed communications between the parties as husband and wife. The objection was, we think, properly overruled.

The object of the statute of 1879, Acts 1879, p. 245, was not to impose additional restrictions as to the disclosure of communications between husband and wife, but to continue the law as it has long existed upon the subject. The authority given by the wife to the husband to transact her business, is not confidential, nor intended to be private. Such authority may be in writing or it may be verbal. It is intended to be known, and would be worthless unless known. There was no error in admitting the evidence.

The court, over the objection of the appellant, instructed the jury that if they found for the appellee they should allow her the amount of the note and interest. This was wrong. The proof showed that the appellee had purchased the note at about \$60 less than was due upon it. She was entitled to recover the amount which she paid for the note and interest, not the amount due on it at the time and interest upon that sum. The note is not negotiable by the law merchant, so that the case falls within the decision in *Foust v. Gregg*, 68 Ind. 399, and cases there cited. For this error the case should be reversed, unless the appellee shall remit the sum of \$60 within ninety days.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee, unless within ninety days she remit from the judgment the sum of \$60; that upon such remission being made within said time by a proper statement filed with the clerk of this court, the judgment be affirmed.

Thayer v. Younge.

No. 10,107.

THAYER v. YOUNGE.

INJUNCTION.—*Agreement not to Engage in Business.*—*Good-Will.*—*Restraint of Trade.*—*Inadequacy of Consideration.*—*Equity.*—An agreement not to engage in a particular business at a particular place will be enforced at law without enquiring into the adequacy of the consideration; not so on an application for an injunction, as a court of equity may decline to interfere when the disproportion between the consideration and the restriction is such as to make the agreement hard and oppressive.

SAME.—*Complaint.*—*Physician.*—A complaint by one physician against another to enforce by injunction an agreement of the latter to keep out of the practice, which does not show the amount of practice done by each, nor that the business of the plaintiff had been made less remunerative by reason of the breach of the agreement, is not good.

From the Whitley Circuit Court.

S. M. Hench and W. S. Oppenheim, for appellant.

R. Stratton, for appellee.

WOODS, C. J.—The parties to this record are physicians. The appellant sued for an injunction against the appellee, charging that, upon a valuable consideration, stated, the appellee had agreed and promised not to re-engage in the practice of medicine and surgery in Fort Wayne and vicinity, and that, in violation of the agreement, he had returned to such practice in that city and neighborhood, where, since the making of said agreement, the appellant had been and was engaged in such practice. The prayer of the complaint is that the plaintiff recover of the defendant \$1,000, and that the defendant be enjoined from continuing in such practice. Upon the evidence we think the judgment right.

In addition to the failure to allege any real damage done or likely to be incurred on account of the return of the appellee to the practice, the evidence shows that, at the time of making the agreement sued on, the appellee's annual income from his practice amounted to \$5,000; but that, intending to remove from the State, he sold his office and household furniture, and the good-will of his business, and made the promise

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not to practice again in Fort Wayne, all for the consideration of \$150. It is evident, therefore, that the consideration for the promise was disproportionately small.

There is no averment in the complaint in respect to the amount of practice done by either the plaintiff or the defendant, nor that the business of the former was less or less remunerative on account of that of the latter; nor is it alleged or shown inferentially that the breach of the agreement by the defendant had caused or was likely to cause any damage to the plaintiff.

Upon the issues joined, the case was submitted to the court upon evidence consisting of an agreed statement of the facts. The court found for the plaintiff and gave him judgment for damages, assessed at \$150, but refused to grant an injunction. It is of this refusal that the appellant complains.

Mr. Kerr, in his work on Injunctions, p. 513, sec. 35, after stating that "it may be considered as settled at law that the adequacy of the consideration will not be enquired into," although in the earlier cases it was held differently, says that "A court of equity may, however, at its discretion, decline to interfere where the disproportion between the restriction and the consideration is so great as to render the agreement a hard bargain and oppressive." See, also, 2 High Injunctions, p. 776, sec. 1180. No other question has been discussed.

Judgment affirmed, with costs.

No. 9416.

DOWNEY v. LEE.

PROMISSORY NOTE.—*Partial Answer to Complaint.*—In a suit upon two promissory notes, an answer purporting to bar the action, which at most only alleges matter in defence of one of the notes, is insufficient on demurrer.

SAME.—*False Representations.*—In such action an answer that the makers of

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the note purchased a machine which failed to work as represented, etc., without averring that the note was given for the machine, is insufficient on demurrer.

From the Switzerland Circuit Court.

J. D. Works and *J. A. Works*, for appellant.

W. D. Ward and *T. Livings*, for appellee.

BEST, C.—This action was brought by the appellant against the appellee. The complaint consisted of two paragraphs. The first was based upon a note of \$125, dated July 1st, 1878, and payable on or before the 1st of October, 1878. The second was upon a note of the same amount, same date, and payable one year later, both being executed by the appellee to the appellant.

The appellee filed an answer of two paragraphs. A demurrer was overruled to each, a reply filed, a trial had, a verdict returned for the appellee, and, over a motion for a new trial, judgment was rendered upon the verdict.

The errors assigned are that the court erred in overruling the demurrer to each paragraph of the answer, and in overruling the motion for a new trial.

The second paragraph of the answer is as follows: "And for second paragraph of substituted answer plaintiff says he admits he executed the note in suit, but says it was given for a threshing machine which he was to have on trial until the 1st day of October, 1878, and, if it did good work, and did not waste grain, on said day one York Cole was to sign said note, and the note was then to become binding, and the title to said machine was to vest in defendant and said Cole; that he took said machine and tried the same, and, it failing to do good work and wasting grain, to wit, one-tenth of the grain threshed, he notified plaintiff thereof, and that, he failing to make it do good work, or prevent its wasting grain, he, after said trials, on the 18th day of September, 1878, notified plaintiff he would return said machine, and that, while awaiting its removal, to protect it from the weather, he placed the said

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machine in the barn of one Jacob Luthenberg, and that, on the 19th day of September, 1880, the said barn, and the said machine, without fault or neglect on defendant's part, was consumed by fire; and he says plaintiff ought not to recover."

This paragraph was clearly insufficient. It purports to answer the entire complaint, while the facts pleaded only tend to bar a recovery upon one of the notes; which one, is not even stated. The facts thus averred constituted no defence to the action, and the demurrer should have been sustained. *Reid v. Huston*, 55 Ind. 173; *Pouder v. Tate*, 76 Ind. 1.

The first paragraph of the answer avers substantially the same facts, except that it omits to allege that the note mentioned in it was executed in consideration of the purchase or contemplated purchase of said threshing machine. For the want of this averment, and for the reasons given why the second paragraph was bad, this paragraph was insufficient, and the demurrer should have been sustained. This conclusion renders it unnecessary to pass upon the questions arising upon the motion for a new trial, as they may not again arise. The judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to sustain the demurrer to each paragraph of the answer, with leave to amend.

Petition for a rehearing overruled.

 No. 9761.

RYMAN ET AL. v. CRAWFORD ET AL.

BILL OF EXCEPTIONS.—Where time is given at the term of trial, on overruling a motion for a new trial, for a bill of exceptions, and one is filed in time, it embraces all rulings made during the trial.

86	262
135	148
86	262
143	834
86	262
145	617

86	262
150	166

86	262
164	178

86	262
167	120

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WILL.—*Contest of.*—*Undue Influence.*—*Evidence.*—*Conversation.*—In the contest of a will, evidence of conversations with a legatee (a daughter) who is alleged to have exerted undue influence, showing a desire that a will be executed, or making predictions as to its contents, not realized, or that but for her no will would have been made, has no tendency to show undue influence, and may be excluded. So, evidence that the testator did not, for a period of seven years before his death, list his cash on hand for taxation, may be properly excluded.

SAME.—*Sanity of Testator.*—*Witness.*—*Expert.*—*Opinion.*—A person not an expert, after testifying that he had long known the testator, being a neighbor, had often dealt with him, and conversed with him both before and after the execution of his will, is a competent witness to give an opinion as to his soundness of mind.

INSTRUCTIONS.—*Verdict.*—*Harmless Error.*—When it appears that the verdict is right, and that an instruction not applicable to the evidence certainly did no harm, the Supreme Court will not reverse for the error in giving the instruction.

From the Union Circuit Court.

J. R. McMahan, W. K. Jones and W. H. Jones, for appellants.

H. Berry, Jr., F. Berry, J. F. McKee and D. W. McKee, for appellees.

BICKNELL, C. C.—The appellants brought this action against the appellees to contest the will of Alexander Crawford. The action was commenced in the Franklin Circuit Court. The complaint was in three paragraphs. The first alleged that the probate of the will was invalid, because one of the pretended witnesses to the will was not present at its execution, and did not see the testator sign it, nor did the testator acknowledge to her his signature thereto, nor did she ever sign said will as an attesting witness. The second paragraph alleged that the execution of said will was procured by the undue influence of the defendant Margaret Crawford, a daughter of said Alexander Crawford, by whom he was falsely and fraudulently induced, persuaded and forced to make said will contrary to his own wishes. The third paragraph alleged, that when said will was made said testator was of unsound mind, and incapable of disposing of his property.

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It was averred, in the complaint, that the testator's children and heirs at law were the plaintiffs Jane Ryman and Elizabeth Crawford, and the defendants John Crawford and Margaret Crawford. The other plaintiff was the husband of Jane Ryman, and the other defendants were devisees under the will.

Exhibit A, to the complaint, was a copy of the will, as follows:

"I make the following as my last will and testament: I give to my daughter Jane, the wife of Alanson Ryman, the west part of the northwest quarter of section fourteen in township eight and range two, containing ninety acres, in Franklin county, Indiana, to hold and use during her natural life, without being liable for waste or any debts that she may contract, and after her death to be divided among her children. I give to my son John the south part of southeast quarter of section ten of town eight, range two, containing one hundred and eight acres, and the southwest corner of section eleven in town eight and range two, containing forty-six and ten hundredths acres, in Brookville township, Franklin county, Indiana. The residue of my estate I leave for the support of my daughters, Margaret and Elizabeth, during their natural lifetimes, and appoint my son John their guardian, and, at their death, what shall be left from their support to be his.

"In testimony I have hereunto set my hand and mark and seal, May 18th, 1880. his

"ALEXANDER X CRAWFORD.
mark

"The undersigned, signed in the presence of the testator and of each other, saw him and each other affix their names as witnesses, in his presence, this 18th day of May, 1880.

"A. LINDSY.

"GEORGE BERRY."

It was averred in the complaint that the testator died on the 24th day of November, 1880, seized of real estate of the value of \$10,000, and owning personal property of the value of \$2,000. The defendants John Crawford and Margaret

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Crawford answered the complaint by a general denial. The other defendants, who were minors, answered in denial by their guardian *ad litem*. The plaintiff Jane Ryman then filed an affidavit that she could not obtain a fair trial in Franklin county by reason of an odium attaching to her cause of action, on account of local prejudice. Thereupon the venue was changed to the Union Circuit Court. The cause was tried by a jury, who returned the following verdict: "We, the jury, find for the defendants." This was at the March term, 1881. The plaintiffs filed a motion for a new trial, stating eleven reasons therefor, of which the first five charge errors of the court in refusing to admit evidence offered by the plaintiff; the next three charge errors of the court in admitting evidence offered by the defendants; the ninth charges errors of the court in giving to the jury instructions numbered from one to nine inclusive, and in giving each of said instructions; the tenth reason is that the verdict is not sustained by sufficient evidence; and the eleventh reason is that the verdict is contrary to law. This motion was overruled at the same term at which the cause was tried.

The record shows that the plaintiffs excepted to the overruling of the motion for a new trial, and also excepted to the judgment which was rendered on the verdict in favor of the defendants, and that on the 31st day of March, of the March term, 1881, the term of trial, sixty days were allowed to plaintiffs within which to file their bill of exceptions. The plaintiffs appealed from the judgment.

The only error assigned is overruling the motion for a new trial.

The appellees claim that the bills of exceptions "do not present any question as to the rulings of the court below in admitting or excluding evidence, because neither of said bills of exceptions shows that at the time any of such evidence was admitted or excluded the appellants prepared, or were granted a definite time to prepare, a bill of exceptions, but they do

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show that no time was then asked or given to reduce any exception to writing."

The bills of exceptions, however, show that the appellants excepted at the proper time, and that when their motion for a new trial was overruled, before the term of trial had expired, they were granted time to prepare and file their bills of exceptions, and that the same were filed within the time so granted.

The question here presented was determined by this court in *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569. There the court said: "Where leave is granted at the time the motion for a new trial is overruled, and during the term at which the exceptions were taken, it may well be held that it reaches back to and embraces all rulings made during the trial." The case was distinguished from *Sohn v. Marion, etc., Co.*, 73 Ind. 77, and *Backus v. Gallentine*, 76 Ind. 367, because in those cases leave was not obtained at the term when the rulings excepted to were made. It was distinguished from *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144), and *Alcorn v. Morgan*, 77 Ind. 184, because in those cases the exceptions were to rulings upon the pleadings and not to rulings made, as in this case, during the progress of the trial. We think the questions as to the rulings upon the evidence are properly before us.

The first question excluded and discussed in appellants' brief is the following question to the plaintiff Elizabeth Crawford, she having stated as a witness that she had a conversation with the defendant Margaret relative to the making of the will after the will was made:

"Question. State that conversation." Upon objection by defendants, the plaintiffs' counsel stated that by the answer to said question they expected to prove that said Margaret stated to witness shortly after the making of the will, that "when Bradbury Cottrell came there would be a new will made by her father, and that she, Margaret, and her brother John did not get enough as the will then stood."

We think this was properly excluded. It would merely

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have tended to show that Margaret was dissatisfied with the will, and wanted a different one.

The next matter excluded was a conversation between the plaintiff Elizabeth and the defendant Margaret, before the making of the will, as to what the will should contain. The question put to Elizabeth was: "Please state that conversation." Upon objection, the plaintiffs' counsel stated that they proposed to prove that Margaret stated to Elizabeth, not long before the execution of the will, that "she had tried for years to get her father to make a will, and that, if he made one, she, Lizzie, would not have anything left to her; that it would be left in somebody else's hands, to be dealt out as Margaret might direct and as Lizzie might need it."

We think this was properly excluded. It does not tend to show any undue influence exercised by Margaret; in fact, the will gave to Margaret no control over her sister's property or her own either. The interests of both were placed under the control of a trustee, in the will denominated a "guardian." The fact that a daughter desires that her father should make a will amounts to nothing.

The next matter excluded and mentioned among the causes for a new trial, was a conversation between said Margaret and said Elizabeth, after the will was made.

The question put was: "State that conversation." Upon objection, the plaintiffs' counsel stated that they expected to prove that defendant Margaret stated to the witness Elizabeth, shortly after the execution of the will, "that her father would not have made a will had it not been for her; Margaret Crawford." We think this, also, was properly excluded. It would not tend to show undue influence; but, if it had such tendency, the admissions of Margaret would not bind her co-defendants. *Hayes v. Burkam*, 67 Ind. 359. The appellants claim that all these statements were competent, not as admissions, but as "verbal acts." But, however regarded, they had no tendency to prove undue influence; and, if admitted, they would not have changed the result of the trial.

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The fourth and fifth reasons for a new trial are, that the court refused to permit evidence to be introduced by the plaintiffs that the testator had \$700 in gold and silver coin, which was liable to taxation from 1873 to 1880, inclusive, and failed to mention it in his assessment list for taxation, in each of said years, and that, after his death, the unpaid taxes thereon were paid by the defendant John Crawford; and that the court erred in refusing to admit in evidence a certified copy of the tax duplicate, offered by plaintiffs, in order to prove said payment by said John Crawford.

We find no error in the exclusion of this evidence.

The sixth and seventh reasons for a new trial are, that the court permitted Lavina Bossart and George Nyce to give their opinions as to the soundness of the testator's mind, although they were not experts. George Nyce was a neighbor of the testator. He had known him for upwards of twenty years; he had had frequent conversations with him, and dealings with him, before the execution of the will, and had seen and conversed with him shortly after the execution of the will. Having thus stated the grounds of his opinion, his opinion was competent, although he was not an expert. *State, ex rel. Nave, v. Newlin*, 69 Ind. 108; *Doe v. Reagan*, 5 Blackf. 217 (33 Am. Dec. 466); 1 Greenl. Ev., sec. 440, note 4; *Rush v. Megee*, 36 Ind. 69, 78. The seventh reason for a new trial, which relates exclusively to the admission of the testimony of Lavina Bossart, is not discussed in the appellants' brief, and is, therefore, regarded as waived.

The eighth reason for a new trial is expressly waived by the appellants in their brief. The ninth reason for a new trial questions the correctness of each of the nine instructions given by the court of its own motion. We have examined these instructions. Every one of them contains the substance, and nearly all of them the words, of charges heretofore held to be valid by this court, in cases involving the same questions, substantially, as this case.

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The first, fifth, sixth, seventh and eighth are copies of the instructions Nos. 2, 9, 14, 15 and 6, which were sustained by this court, in the case of *Bundy v. McKnight*, 48 Ind. 502. Instruction No. 4 corresponds exactly with the charge sustained by this court in the case of *Hayes v. West*, 37 Ind. 21, 24. Instructions Nos. 2 and 3 are substantially the same as the charge sustained by this court in *Lowder v. Lowder*, 58 Ind. 538. The only objection to be made to instructions thus approved by this court is, that they were not applicable to the evidence. The appellant makes that objection; but we think they were applicable to the evidence here, except the latter part of the eighth instruction. The motion for the new trial mentions nine instructions. In fact, there were only eight.

The latter part of the eighth instruction was as follows: "In determining the true character of the will in question, in reference to the parties to this suit, it will be proper for you to consider the pecuniary circumstances of the respective parties at the time the will was made." The appellants insist that there was no evidence at all as to the "pecuniary circumstances" of the parties to this suit, and that, therefore, in this respect, this part of the instruction was erroneous. If there was no evidence as to "pecuniary circumstances" which the jury could consider, it would seem that the instruction complained of could do no harm, and, the jury having reached a correct conclusion, it is evident that the instruction actually did no harm.

Where the verdict is right, the judgment will not be reversed for such an error in the instructions. *Simmon v. Larkin*, 82 Ind. 385.

The tenth and eleventh reasons for a new trial are that the verdict was not sustained by sufficient evidence, and is contrary to law. We have carefully examined the evidence and think it fully sustains the verdict, and is not contrary to law; but even if the preponderance of the evidence were doubtful, the well established rule of this court would forbid us to re-

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verse a judgment where there is any evidence tending to support it.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

86	270
127	296

No. 9870.

QUAKENBUSH v. TAYLOR, ADMINISTRATOR, ET AL.

DECEDENTS' ESTATES.—*Estates Less than \$500.—Widow Takes Free from Judgment Lien.*—A widow to whom her husband's whole estate, consisting in part of lands, is awarded, under the statute (R. S. 1881, sections 2419–2422), takes the lands free from the lien of judgments rendered against her husband in his lifetime.

From the Greene Circuit Court.

E. E. Rose and *E. Short*, for appellant.

R. R. Taylor, *A. G. Cavins* and *E. H. C. Cavins*, for appellees.

FRANKLIN, C.—Appellee, as administrator of George R. Taylor's estate, sued appellant, as the widow, together with the heirs of one James Quakenbush, deceased, alleging that said appellee's decedent in his lifetime, to wit, on the 17th day of September, 1872, recovered a judgment against said James Quakenbush in the Greene Common Pleas Court for the sum of \$92.98, and costs of suit; that, at the time of the rendition of said judgment, said James Quakenbush was the owner of certain real estate in said county of Greene; that after the rendition of said judgment, to wit, on the 10th day of December 1874, said James Quakenbush and his wife, the appellant herein, conveyed 34 acres of said real estate by warranty deed to Henry T. Jewell, who is also made a defendant

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herein; that said James Quakenbush died intestate in the year 1879, the owner of 24 acres of said real estate, giving a description of both said tracts of land; that there was no administration on the estate of said James Quakenbush; but that the widow, the appellant, made application to the Greene Circuit Court to have the property left by said James Quakenbush set off to her, as being an estate worth less than \$500; that such proceedings were had thereon that on the 6th day of July, 1880, all of said decedent's estate, including said 24 acres of land, was set off to said widow under her said claim; that said judgment remains wholly unpaid; and praying for a decree making said real estate subject to the payment of said judgment.

A demurrer was filed and overruled to the complaint.

Appellant answered separately in two paragraphs: 1st. A denial. 2d. The proceedings and order of the court decreeing said 24 acres of land to her; that she had accepted the same, and, under the provisions of the statute, had paid funeral expenses, expenses of last sickness, and taxes on said land, in the aggregate amounting to \$168.99; that the whole estate under the appraisement, consisted of \$21.35 worth of personal property, and \$288 worth of real estate, aggregating \$309.35.

A demurrer to the second paragraph of appellant's answer was sustained. There was a trial by the court, finding for appellee, and a decree subjecting two-thirds of said 24 acres of land to sale for the payment of said judgment.

Appellant has assigned as errors the overruling of the demurrer to the complaint, and the sustaining of the demurrer to the second paragraph of answer.

The ruling upon each of these demurrers presents substantially the same question, and that is, did the widow take the land subject to or exempt from the lien of the judgment?

There is no controversy about the facts; it is simply a question of law.

Section 136 (2 R. S. 1876, p. 542,) of the act for the settlement of decedents' estates, reads as follows: "Upon such

Quakenbush v. Taylor, Administrator, *et al.*

court ordering the delivery of possession of such estate to such widow, such clerk shall make out, and deliver to her, a certificate thereof, which shall be all the authority necessary to enable her to sue for and recover all debts due the decedent, and the possession of any property belonging to such estate, such suit being prosecuted in her own name, and such widow shall not be liable for any of the decedent's debts, except mortgages of real estate, but she may pay and may be sued for reasonable funeral expenses of the deceased; and expenses of his last sickness."

This section is the conclusion of the provisions for the giving to the widow all the estate, both personal and real, where it does not exceed in value the sum of \$500, and appears to give the widow an absolute title to all of such property except as against specific liens, and mortgages on real estate are mentioned as exceptions. It gives her the right to sue for and recover the possession thereof in her own name.

In the case of *Noblett v. Dillinger*, 23 Ind. 505, it was held that the title did not vest in the widow until the right had been adjudicated and ordered by the court. In this case that was done.

In the case of *Recker v. Kilgore*, 62 Ind. 10, it was held that personal property mortgaged by the decedent could be recovered, in an action of replevin, from the widow, notwithstanding it had been ordered and decreed to her by the court as a part of her husband's estate, worth less than \$500. The court held that, while it was properly decreed to her, she held it subject to the mortgage lien created by the husband, and that the only remedy she had was to redeem from that lien.

The proceeding in the case of *Mead v. McFadden*, 68 Ind. 340, was a complaint by a widow to enjoin an execution creditor from selling certain real estate formerly belonging to her deceased husband, which execution had been levied upon the same in his lifetime, alleging that upon her application the whole of her said husband's estate, including the real estate so levied upon, had been appraised, and did not exceed in

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value \$500, and claiming it as belonging to her under the statute. The court held that the action could not be maintained.

That case is very plainly distinguishable from the one under consideration. There, no order of the court had been made decreeing the property to her. The title had not vested in her. *Noblett v. Dillinger, supra*. And a specific lien had been created upon the property, by the levy of the execution in the lifetime of the owner. In the case at bar, neither of such facts existed; here the property, without objection, had been decreed to the widow, and no specific lien existed upon it by the levying of an execution or otherwise. That the only lien upon it was the general lien of the judgment, created by the statute.

In the case of *Mead v. McFadden, supra*, the proceedings under the law for decreeing the whole estate, without administration to the widow, where it did not exceed \$500, were not completed by the court so ordering. And the case was decided under the 43d section of the descent law, which provided for the widow's claim of \$500, against estates worth more than \$500, where letters of administration had been taken out, being only a lien along with judgments on the real estate of decedent; that her lien was not created until the death of the husband, and that it was junior and subject to the liens of judgments rendered in his lifetime.

That section of the statute does not apply to the case under consideration. A judgment is not a lien upon personalty, and is only by statute made a lien upon realty. This lien is purely a creature of legislation, and the Legislature may make, modify, or remove it at pleasure.

A judgment creditor has no right in the property of his judgment debtor, he only has the right to make his judgment effectual, subject to the exemption laws and other statutory provisions. Freeman Judg. (3d ed.), section 338. But when a levy of the execution is made, a specific lien attaches and

Quakenbush v. Taylor, Administrator, et al.

dates back to the date of the judgment, and, when levied upon sufficient property, operates *sub modo* as a release of all other property of the judgment debtor and a satisfaction of the judgment. Freeman Judg., *supra*; Rorer Jud. Sales, section 1011; *Lindley v. Kelley*, 42 Ind. 294; *Frank v. Brasket*, 44 Ind. 92.

And in the case of *Mead v. McFadden*, *supra*, the widow had not, as in this case, assumed and paid the funeral expenses, expenses of last sickness, etc. The case under consideration aptly illustrates the difference between those two cases and the aforesaid statutory provisions.

This case comes under a statute that was intended to prevent the unnecessary expenses of administration where the estate is worth less than \$500, and gives the whole of it to the widow, with the exceptions named. If this estate had been managed under the 43d section of the statute, *supra*, and letters of administration granted, and two-thirds of the land sold for the payment of the debts, after the expenses of administration and said preference claims were paid, there would have been nothing left to pay on appellee's judgment, and we think in such cases the Legislature intended to give it to the widow instead of having it exhausted in unnecessary expenses of administration; and after appellee has let his judgment rest until appellant has fully complied with the statute to have the land decreed to her, and has paid all the preference claims as required, we do not think that he now has the equitable right to come in and have two-thirds of the land sold for the payment of his judgment; if so, the widow's one-third left is worth less than the preference claims she has paid, and her interest in the estate would be thus entirely wiped out, which we do not think was contemplated by the framers of said statute.

A debtor is allowed \$600 worth of property as exempt from execution, and by his death the creditor is placed in no worse condition by allowing his widow only \$500 exempt from the payment of his debts, with the exceptions named in the statute.

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The court below erred in overruling the demurrer to the complaint, and in sustaining the demurrer to the second paragraph of the answer. The judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and it is in all things reversed, at appellee's costs, and that the cause be remanded for further proceedings in accordance with this opinion.

86	275
124	103
126	98

 No. 8983.

WILSON v. SHEPLER.

SEDUCTION.—*Action by Woman.—Damages.—Evidence.—Pecuniary Condition of Defendant.*—In an action by a woman for her own seduction, evidence of the pecuniary circumstances of the defendant may be considered in determining compensatory damages.

PLEADING.—*Quære*, What is a sufficient complaint by a woman for her own seduction?

From the Henry Circuit Court.

J. H. Mellett, E. H. Bundy and J. Brown, for appellant.

J. M. Brown, for appellee.

WOODS, C. J.—The appellee obtained a verdict and judgment against the appellant for \$1,200, upon a complaint charging "That on the 1st day of January, 1879, and on divers other days and times between that day and the beginning of this suit, she being an unmarried woman, the defendant did her, the said plaintiff, unlawfully debauch and carnally know, whereby she became pregnant with and was delivered of a child, and greatly suffered in peace of mind and good name, and pain of body, and lost her own time and labor, and incurred great expense in and about her nursing, and in obtaining medical assistance, all to her damage," etc.

Wilson v. Shepler.

The circuit court treated this as a complaint for seduction, and the appellant has not questioned its sufficiency, either by demurrer or by assignment of error. If the action were by a father or master for the seduction of a daughter or servant, the averments would doubtless be sufficient; but the suit being in the name and for the use of the woman herself, and maintainable only by virtue of the statute which grants the right of action, it is not clear but that a seduction ought to be alleged, if not a statement made of the particular arts and persuasions employed in its accomplishment. See *Rees v. Cupp*, 59 Ind. 566; *Dowling v. Crapo*, 65 Ind. 209; *Smith v. Yaryan*, 69 Ind. 445 (35 Am. R. 232); *Hart v. Walker*, 77 Ind. 331; *Johnson v. Holliday*, 79 Ind. 151.

The court charged the jury that "The fact that the defendant is financially in limited circumstances, and makes his living by manual labor, if such is the fact, can not be considered by you to reduce the amount of compensation due to the plaintiff, if you find in her favor, but may be considered by you in determining whether you will inflict smart money upon the defendant, and, if so, the amount of it; for you may, if you think the circumstances justify it, in addition to compensating the plaintiff, assess damages against the defendant by way of punishing him and deterring others from a like offence."

It is insisted that this instruction was wrong; and, in view of the evidence, which showed that the defendant had, before the suit was brought, paid the plaintiff enough to compensate her amply for lost time and actual expenses incurred on account of the wrong done her, we think the instruction probably misled the jury.

The right of a woman to sue for her own seduction is purely statutory, and it is not easy to define the rule of damages in such a case, or to apply the rules which have obtained in actions for the seduction of a wife, daughter or servant. The statute which gives the action reads: "Any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be as-

Wilson v. Shepler.

essed in her favor." Code of 1852, section 24; R. S. 1881, section 263.

So far as the plaintiff in such a case may have suffered a loss of time, and have incurred actual expense, her compensation may be measured by an easy rule, and, if the instruction in question could, in the light of the evidence, be construed to mean that, from the compensation so found due, there can be no deduction on account of the circumstances of the defendant, it would be free from objection. But, besides the loss of time and actual expenses, the injured party is entitled to *compensation* for the disgrace and personal injury which she suffers, for which it is evident there can be no definite money standard or measure. The jury must exercise a reasonable discretion, and, in order to do this with fairness, must be let into a knowledge of the situation and circumstances of both parties. In fixing the compensation of the one, they necessarily inflict punishment upon the other, and the instruction attempts to require a separate consideration of things which, if not identical, are interdependent and commensurable. We do not mean that punitive damages are not to be allowed in such cases, but it is evident that, if there has been a real seduction, such damages, however great, can never equal a just compensation; and, on the other hand, there may be danger that, in the effort to give a proper compensation, a punishment may be inflicted which, when viewed as punishment alone, might be unduly severe. The character of the injury may be such that the jury will be influenced more by considerations of punishment than of compensation, substituting the former for the latter, 2 Sedgw. Damages, side page 456; but practically it must be evident that these are correlative terms.

The authorities upon the subject, as already stated, have reference to actions by a husband, parent, or master, but, so far as they may be deemed to be in point, lend support to the view that the pecuniary condition of the defendant may be considered in determining the injury done to the plaintiff. In

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the foot note, 2 Sedgw. Damages (7th ed.), 512, it is said: "Evidence of the pecuniary condition of both plaintiff and defendant has been held admissible, not for the purpose of ascertaining how much the defendant can pay, but how much the plaintiff has been injured." See *White v. Murtland*, 71 Ill. 250 (22 Am. R. 100); *McAulay v. Birkhead*, 13 Ired. L. (N. C.) 28; *Brown v. Barnes*, 39 Mich. 211; S. C., 33 Am. R. 375, and note; *Clem v. Holmes*, 33 Grat. 722 (36 Am. R. 793); *Lavery v. Crooke*, 52 Wis. 612 (38 Am. R. 768); *Andrews v. Askey*, 8 Carr. & Payne, 578.

The action for the seduction of a daughter or servant, from the time when a departure was made from the strict rule of compensation for service lost, has been recognized as peculiar; and still more distinctly *sui generis* is the statutory action by the woman herself; and we are convinced that it will be the wiser rule to admit the jury to a full knowledge of the facts, so that, in the language of TINDAL, C. J., in *Andrews v. Askey*, *supra*, they may "take into consideration the situation in life of the parties, and say what" they "think, under all the circumstances of the case, is a reasonable compensation." Such would seem to be a reasonable interpretation of the comprehensive terms of the statute in respect to the amount of the recovery.

Other questions discussed may not arise again.

Judgment reversed, with instructions to grant a new trial.

86	278
126	475
86	278
133	555
86	278
135	19
86	278
146	40

No. 9843.

HENDRICKS ET AL. v. FRANK ET AL.

TRIAL.—*Issues.*—*Jury.*—*Count.*—*Fraud.*—*Contract.*—*Statute Construed.*—Complaint by several separate creditors of S., averring their respective claims upon account, and that S., being insolvent, had transferred his goods and claims (\$8,000) to other creditors, made defendants with S., upon a writ-

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ten agreement that after disposing of goods and collecting claims enough to satisfy their demands (\$2,000) they would return the residue to S. or his other creditors; that afterwards, without any new consideration, and without the knowledge or consent of the plaintiffs, and to defraud them, the written contract was so modified as to make the title of those other persons absolute, without any condition to return the property as was first agreed, and that they had converted all of it to their own use, and removed it beyond the reach of execution. Issues were made and tried by jury.

Held, that the suit was formerly of an exclusive equitable jurisdiction, and under section 409, R. S. 1881, should be tried by the court, and not by jury.

SUPREME COURT.—*Appeal.*—*Parties.*—After submission of a cause by agreement, in the Supreme Court, it is too late to object that the proper parties to the appeal have not been made.

From the Hamilton Circuit Court.

J. E. McDonald, J. M. Butler, G. C. Butler, T. J. Kane, T. P. Davis, J. L. Griffiths and A. F. Potts, for appellants.

F. M. Trissal, D. Moss, R. R. Stephenson and W. S. Christian, for appellees.

MORRIS, C.—The complaint in this case contains two paragraphs. The first is as follows:

“Mayer Frank, Henry Frank, Mary B. Loeb, Jacob S. Frank (composing the firm of Frank Bros. & Co.), Alfred Seasingood, Charles Seasingood, Lewis Seasingood, Elias Noble (composing the firm of Seasingood & Co.), and A. B. Gates (composing the firm of A. B. Gates & Co.) v. John W. Sanders, Victor K. Hendricks, William D. Cooper, John W. Murphy, Harold B. Hibben, Franklin Landers, Joseph B. Ship, William D. Bridges, Albert P. Sanders, guardian of John W. Carson.

“The plaintiffs above named complain of the defendants above named, and say that the defendant John W. Sanders is indebted to the firm of Frank Bros. & Co., for goods sold and delivered, in the sum of \$500, which is due and unpaid, the items of which indebtedness are set forth in a bill of particulars herewith filed, marked ‘A’; that he is indebted to the plaintiffs Seasingood & Co. in the sum of \$420, which is due

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and unpaid, and upon and for which judgment was rendered in the Hamilton Circuit Court, on the 26th day of April, 1881, unsatisfied, unappealed from and unreversed; that he is also indebted to A. B. Gates & Co. in the sum of \$121, being the amount of principal, interest and costs on a judgment recovered by them before one Nevill Redman, a justice of the peace in and for Jackson township, Hamilton county, Indiana, against said John W. Sanders, on the 4th day of March, 1881, which judgment is in full force, unpaid and unappealed from; that all of the indebtedness aforesaid was contracted prior to the 15th day of February, 1881; that, at the date last aforesaid, the said John W. Sanders was the owner of a stock of merchandise, notes and accounts, of the value of \$8,000, and was at the time insolvent, and did not have then, nor does he now have, a sufficient amount of other property, subject to execution, to pay his debts; that on said last named date, he entered into a written agreement with his co-defendants (a copy whereof can not be filed herewith, for the reason that the same is in the possession of the defendants or lost), which said agreement was, in substance and effect, as follows: Said Sanders thereby transferred all of said notes and accounts and delivered all of said stock of goods to his said co-defendants, in consideration of which transfer and delivery his said co-defendants undertook and agreed that they would sell and dispose of a sufficient quantity of said goods and collect of said notes and accounts enough to pay an indebtedness of \$2,000 owing them, said co-defendants, by said John W. Sanders, and when that amount had been realized, would return the residue of said goods, notes and accounts to the said John W. Sanders, or his other creditors. In pursuance of which agreement said co-defendants took possession and control of all of said property, but immediately thereafter, without any new consideration, but for the fraudulent purpose of cheating and defrauding the plaintiffs out of the benefits of said first agreement, and for the purpose of securing all of said property for themselves, and thereby cheating, hindering,

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delaying and defrauding the plaintiffs, entered into another agreement with the said John W. Sanders, whereby the terms of the said agreement hereinbefore recited were, without the knowledge and consent of the plaintiffs, changed so as to transfer and deliver all of said property to the said co-defendants absolutely, without any condition whatever as to the residue of said property being returned to the said Sanders or his other creditors; that when said last named agreement, changing the first mentioned agreement, was entered into, said John W. Sanders did not (nor does he now) have other property subject to execution, sufficient to pay his debts; that, after said agreement was entered into, said co-defendants of said Sanders appropriated all of said notes, accounts and goods, to their own use, collected said accounts and notes, and sold all of said goods to parties unknown to the plaintiffs, and have removed the same beyond the reach of an execution that might be issued against said Sanders; that the value of the goods and the proceeds of the notes and accounts so appropriated is \$8,000."

The plaintiffs pray judgment against Sanders for the sums respectively due them, and that the co-defendants may be required to account for and pay to the plaintiffs a sufficient amount to pay such judgments, and for further relief.

The second paragraph is the same as the first, except that it does not allege any change in the contract made between Sanders and his co-defendants on the 15th day of February, 1881. It asks that said contract be enforced for the benefit of the appellees and for the payment of their respective demands.

The defendants below, except Sanders, demurred separately to each paragraph of the complaint. The court overruled the demurrers. John W. Sanders made default. The defendant Bridges filed an answer in denial of the complaint. He also filed an answer disclaiming any interest in the suit. The defendants, other than Bridges and Sanders, filed an answer in two paragraphs, the first being the general denial. Issue

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was taken on the second paragraph. A third paragraph of the answer was filed, upon which issue was taken. The cause being put at issue, the plaintiffs below demanded a jury to try the same. To this the appellants objected, insisting that under the law the issues should be tried by the court. The objection was overruled, and the cause submitted to a jury for trial, to which the appellants properly excepted. The jury returned a verdict in favor of Seasongood & Company against the appellants and Albert P. Sanders, and in favor of Mayer Frank & Co., against the same parties. The suit had been dismissed as to A. B. Gates & Co. The appellants moved for a *venire de novo*; the motion was overruled. They then moved for a new trial, and this motion was also overruled, and judgment rendered in favor of the appellees, in accordance with the findings of the jury. The evidence is in the record by bill of exceptions.

The errors assigned question the rulings of the court upon the demurrers to the complaint and the several motions of the appellants.

The appellees move to dismiss the appeal on the ground that Albert P. Sanders, against whom judgment was rendered, does not join in the appeal, and has not been notified of the same. We think the motion should be overruled. The cause was submitted for a hearing in this court upon the written agreement of the parties, without objection. Such submission must be regarded as a waiver of the objection now urged. *Easter v. Severin*, 78 Ind. 540; *People's Savings Bank of Evansville v. Finney*, 63 Ind. 460; *Field v. Burton*, 71 Ind. 380.

The appellants insist that the facts stated in the appellees' complaint would have been cognizable prior to the 18th day of June, 1852, only in a court of equity; that they would have constituted a cause of exclusive equitable jurisdiction; that an action at law prior to the 18th of June, 1852, could not have been maintained upon the facts as they are stated in the complaint; hence they insist that the court below must

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have erred in submitting the cause to a jury for trial, or in overruling their demurrer to the complaint.

The appellees contend that the cause is not one of exclusive equitable jurisdiction as the law stood prior to June 18th, 1852, but one of concurrent jurisdiction, and that, therefore, the cause was properly submitted to a jury for trial.

Section 409 of the code of 1881 provides as follows:

“Issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court.”

The word “causes,” as used in the above section, is equivalent to, and means the same as, the word “suits.” The latter word might be substituted for the former, without changing the meaning of the section. The word “causes,” as used, does not mean “subjects.” A court of equity might have exclusive jurisdiction of a suit relating to a subject of which it has only concurrent jurisdiction. Upon the general subject of fraud courts of equity have concurrent jurisdiction with courts of law; but in a cause or suit to rescind a contract for fraud, it had, in June, 1852, exclusive jurisdiction. So, too, if a debtor should make an assignment for the benefit of creditors, upon the condition that they release and discharge him for half the amount due them, his creditors might treat the assignment as void, proceed against their debtor at law, and attach or levy upon the assigned property; but if, in such case, they chose to abide by the assignment, and should sue the assignee, to compel him to account or to execute his trust as assignee, the cause would be one of which a court of equity, prior to the 18th of June, 1852, would have had exclusive jurisdiction; and the issues in such a cause must, under the present statute, be tried by the court. The manifest purpose of the above statute is to dispense with a jury in the trial of issues in causes which, before the adoption of the code, were triable by the court as a court of equity. To determine whether a court of equity would have had exclusive jurisdiction of the cause in hearing before the adoption of the code of 1852, we must look

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to the complaint, the rights and interests involved, and the relief demanded.

Could a court of law, prior to June 18th, 1852, have taken jurisdiction of, and tried, the cause of action set forth in the complaint? The appellees did not have the legal title to the property described in the complaint. The appellants were not their debtors, had made no contract with them, nor had they, according to the statements of the complaint, taken possession of any property in which appellees had a legal interest. All that is claimed in the second paragraph is that the appellants had, by a contract with Sanders, got control of property which they had agreed to manage for the benefit of the appellees. At law, the appellees could claim no interest in this contract, nor could they maintain a suit upon it. At law, the right of action is vested solely in the party having the strict legal, in exclusion of mere equitable, title. "If a bond be given to A. conditioned for the payment of money to him for the use or benefit of B., or conditioned to pay the money to B., the action must be brought in the name of A., and B. can not sue for or release the demand." 1 Chitty Plead. 3. At law, the appellees could not, prior to June 18th, 1852, have maintained an action upon any of the contracts alleged in the complaint. *Bird v. Lanius*, 7 Ind. 615; *Salmon v. Brown*, 6 Blackf. 347; *Farlow v. Kemp*, 7 Blackf. 544; *Britzell v. Fryberger*, 2 Ind. 176; *Conklin v. Smith*, 7 Ind. 107. Treated as an action at law, the complaint would be clearly bad. It not only shows that the appellees have no legal interest in the contracts made between Sanders and the appellants, but that they have no legal interest in the property embraced in those contracts. If we regard the suit as at law, the complaint is clearly bad, for the reason that it alleges no joint cause of action in the appellees. Their claims against Sanders are distinct and independent. One firm has no interest in, or right of action to, the causes of action alleged by others. *Berkshire v. Shultz*, 25 Ind. 523; *Griffin v. Kemp*, 46 Ind. 172; *Neal v. State, ex rel.*, 49 Ind. 51.

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But in equity the rule is different. The party for whose benefit a contract is made may sue upon and enforce it. *Bird v. Lanius, supra.* It is in equity alone that the appellees could reach any benefit secured them by the contract made between Sanders, their debtor, and the appellants. So, too, they could only reach funds in the hands of the appellants, as the proceeds of the sale of the goods mentioned in the complaint, by proceedings in the nature of a bill in equity. If liable, at all, to the appellees, the appellants are so liable as trustees. *Gimbel v. Stolte*, 59 Ind. 446.

The complaint, in its form and substance, is in the nature of a bill in equity, seeking to enforce a contract made by other parties for their benefit, and to charge the appellants as trustees, liable to account to them for funds in their hands as such. Upon the facts stated we think the appellees are entitled to some equitable relief, and that the complaint is, therefore, good; but we also think that, prior to the 18th of June, 1852, a court of equity would have had exclusive jurisdiction of the cause stated in the complaint against the appellants, and that they had, therefore, a right to have the issues in the cause tried by the court.

The appellees contend that a legal cause of action is stated in the complaint against John W. Sanders. In a limited sense this is true; but it is stated rather for the purpose of showing their right to proceed equitably against the appellants than for the purpose of obtaining judgments against Sanders. Sanders made default, and there was nothing to try as against him. Besides, the demand for judgment against Sanders was no part of the cause of action against the appellants, nor was it necessary that any judgment should be rendered against him in order to secure the relief demanded against the appellants. The court might have found the amounts due from Sanders to the appellees, and, without rendering judgments for them against him, ordered the application of any sum found in the hands of the appellants as trustees, to its payment, as was formerly done in equity.

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We think the court erred in submitting the issues in the cause to a jury for trial, and that, for this error, the judgment below should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

No. 7184.

SCOTT ET AL. v. HUDSON.

HUSBAND AND WIFE.—*Wife's Land.—Presumption.—Crops.—Tenant.*—Where a husband aids the family in the cultivation of his wife's lands, the presumption, in the absence of other proof, is, under our statute, R. S. 1881, section 5116, that the crops produced are hers, and not his as tenant.

From the Crawford Circuit Court.

B. P. Douglass, S. M. Stockslager and S. D. Luckett, for appellants.

N. R. Peckinpaugh and W. T. Zenor, for appellee.

BLACK, C.—Elizabeth Hudson, the appellee, sued Harrison H. Scott, Henry Scott and Nelson Wilburn, the appellants, to recover damages for the wrongful taking of certain corn in November, 1877.

A motion for a new trial made by appellants was overruled, and this ruling is alone assigned as error. Of the causes stated in the motion, the giving of a certain instruction to the jury is the only one urged here by counsel.

By admissions made on the trial, it appeared that the appellee was the owner of the land on which the corn in question grew. The corn was raised by the labor of appellee's husband, assisted by appellee and their two daughters, the daughters being unmarried minors, who resided with their

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parents. Appellee owned one horse and one plow used in the cultivation of the corn.

Appellant Harrison H. Scott was a legally qualified deputy county treasurer, and he "had in his hands for collection, as such deputy treasurer, poll taxes against William Hudson, the husband of the plaintiff, none of which accrued on" said corn or on the land on which it grew.

Said deputy treasurer levied on, advertised and sold ninety-two shocks, being two-thirds of the corn so raised, to pay said taxes, the appellant Wilburn being the purchaser. The corn so sold was worth \$35, which was the amount of the verdict. It was sold to Wilburn for \$4, which sum he paid to said deputy, who applied it on said taxes, which exceeded the amount so received by said deputy.

It was admitted that the corn so sold was taken by appellants. Appellee forbade the sale of the corn by said deputy, and publicly notified him and the bidder at the time of the sale that it was her separate property, and notified the purchaser that it was her property; and when said purchaser and the appellant Henry Scott, who acted with said purchaser, undertook to remove the corn, she forbade their entry upon the premises for that purpose, and forbade the removal of the corn. The rental value of the land on which the corn grew was, in kind, one-third of the crop raised, divided in the field.

The proposition in the instructions to the jury, to which objection is made in argument on behalf of the appellants, was a statement that a married woman may rent her real estate, "or she may hire it cultivated; and because the husband aids in the cultivation, it can not be presumed that he is a tenant and pays rent; and, in the absence of any proof upon that subject, the presumption of the law is that the crops belong to the owner, when the wife with her husband and their children jointly occupy the premises."

The statute provides that "No lands of any married woman, shall be liable for the debts of her husband; but such lands

Scott *et al.* v. Hudson.

and the profits therefrom, shall be her separate property, as fully as if she was unmarried." 1 R. S. 1876, p. 550; R. S. 1881, sec. 5116.

It seems to have been supposed by appellants that because the husband aided in the cultivation of the land, the "profits" would be presumed to be only such portion of the crop as would have been the reasonable rental value of the land if let to rent in kind.

If a married woman's real estate should be, in fact, let to rent, the profits would be the proceeds in money or property received by her as rent; but if there be no letting, the profits are the products of the land. The fact that her husband cultivates the land, or assists in its cultivation, will not raise a presumption that he does so as her tenant, and that he owns the products or a portion thereof.

If, by the facts of the case, it had been needed, the instruction might have been more favorable to the appellee; for it is not necessary that the family should reside upon the land of the wife, cultivated by the husband, to make the crops produced the profits of her real estate. The question whether property accumulated through the labor of the husband may be reached in the hands of the wife by the husband's creditors, through a proper proceeding for such a purpose, was not involved in the case.

The property taken by the appellants was plainly the property of the appellee. The question has been before this court several times, and does not now need a lengthy discussion. *Johnson v. Runyon*, 21 Ind. 115; *Cooper v. Ham*, 49 Ind. 393; *Montgomery v. Hickman*, 62 Ind. 598; *Patton v. Rankin*, 68 Ind. 245 (34 Am. R. 254); *Stout v. Perry*, 70 Ind. 501.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of appellants.

 Castor v. Jones *et al.*

No. 9412.

CASTOR v. JONES ET AL.

WILLS.—Construction.—Widow.—Annuity.—Contract.—The substance of a writing in the form of a will was, that the testator gave to a son-in-law certain personal property and a farm, to be held during the life of the testator and wife, and after their deaths the devisee to pay all taxes, take care of the testator and wife while they lived, pay their funeral expenses, take care of a daughter while she remained unmarried, and “pay me \$250 by the first of January in each year, * * during the natural lifetime of myself and wife,” with interest after maturity, and to live on the farm with the testator while the latter and his wife lived; and the devisee accepted the provisions of the will, taking possession, etc.

Held, that the instrument, though having some elements of a contract, yet was a will, inasmuch as it was a testamentary disposition of property.

Held, also, that, upon the death of the testator, his widow became entitled to an annuity of \$250, which was a charge on the land devised.

From the Montgomery Circuit Court.

G. D. Hurley, B. Crane and A. B. Anderson, for appellant.

A. Thomson, T. H. Ristine, B. T. Ristine, P. S. Kennedy and W. T. Brush, for appellees.

ELLIOTT, J.—The appellant claims that under the will of her deceased husband, Isaac Castor, she is entitled to an annuity of \$250, and that it is a charge upon the real estate devised to Daniel Rhodes. The circuit court decided against her, and she prosecutes this appeal.

The provisions of Isaac Castor’s will which materially affect the case are these: “1st. I give and bequeath to my son-in-law, Daniel Rhodes, all of my personal property now on the farm where I reside, with the exception of one black mare and three milk cows, for to have and to hold for and in consideration hereinafter mentioned. 2d. I give and bequeath the farm where I now live to the said Daniel Rhodes, described as follows, to wit: The east half of the northeast quarter of section 30, township 19 north, of range 3 west, for to have and hold and have full use of in every way during

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the natural life of myself and wife, Amy Castor, said Rhodes for to pay the tax on said property, both real and personal, according to law, and bring me the receipts for the same yearly; for and in consideration of the above, said Rhodes is to take care of me and of my wife Amy during our natural lifetime, and be at all expense every way in doctoring and funeral expenses; said Rhodes is to take care of my daughter Indiana so long as she remains single, and she is for to have two good beds and bedding that she now has; said Rhodes is for to pay me \$250 by the first of January in each year, commencing January, 1875, during the natural lifetime of myself and wife; if said money is not paid at the time, for to draw ten per cent. interest; said Rhodes to have full and free possession of said property during the natural lifetime of myself and wife. 3d. Said Daniel Rhodes for to have all my property, both real and personal, at the death of myself and wife." Following these provisions, which we have copied literally, are items making small bequests to various kinsmen, and requiring Rhodes to pay them. The will closes with this paragraph: "Said Rhodes for to live on said farm and in said house with me; for to comply with said will during the natural lifetime of myself and said wife; for to have all notes, money and effects belonging to me at the death of myself and wife; if said Rhodes leases said farm this for to be null and void." The complaint alleges that Rhodes accepted the provisions of the instrument and is in absolute possession of the property devised to him, and that the validity of the will was judicially declared by the Montgomery Circuit Court, in a cause wherein the appellees were plaintiffs and Daniel Rhodes was defendant.

It is true, as appellees contend, that the instrument has many of the elements of a contract, but the intention of its author to make it a testamentary disposition is nevertheless clearly apparent. No matter what may be the form of the instrument, if the intention to make such a disposition of its author's estate is disclosed, it will be treated as his will. Thus

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a will may be expressed in letters. *Wagner v. McDonald*, 2 Har. & J. 346; *Morrell v. Dickey*, 1 Johns. Ch. 153. Or in an instrument in form a power of attorney. *Rose v. Quick*, 30 Pa. St. 225. So in the form of a deed. *Turner v. Scott*, 51 Pa. St. 126; *Miller v. Holt*, 1 Am. Prob. Cases, 199; *Carlton v. Cameron*, 38 Am. R. 620. So, too, it may be in form and in some substantial respects a contract. *Green v. Froud*, 3 Keble, 310; *Hixon v. Wytham*, Ch. Cases, 248. There can be no doubt as to the character of the instrument, it is in form a will, it professes to be a will, and its principal provisions are those of a will. This court has passed upon the character of this instrument, and declared it to be a will. *Jones v. Rhoads*, 74 Ind. 510.

The character of the instrument being certain, the work of the court is to ascertain its meaning. As the books put it, "the intention of the testator is the polestar," and the instrument is to be so construed as to carry that into effect. All the provisions of the will are to be taken into consideration, and isolated expressions are not to control the general tenor of the instrument.

The draftsman of the will of Isaac Castor was, it is evident, not an educated person. His lack of knowledge of matters of law, his defective command of words, and his confused jumbling together of discordant things, have clouded, but not obscured, the intention of the testator. The desire of Isaac Castor to provide for his wife is strongly and clearly expressed in all the provisions of the will. It appears in every clause in which a burden is imposed upon the devisee. Wherever anything of benefit is provided for, it is for the joint benefit of the testator and his wife. In not a single instance throughout the entire will is there a severance, unless the clause "pay me" shall be deemed to create it as to the annuity of \$250, here the subject of dispute. Is it not reasonable to presume that a husband who, with such solicitous care, had united his wife's name with his from the beginning to the end of the will, meant to secure for her the small annuity provided? Is it

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just to presume that, having made all the beneficial provisions of the will apply to both of them, he here reserved the annuity to himself alone?

Clauses in a will are to be construed by the aid of clauses or words with which they are grouped. The clause providing for the annuity is grouped with provision for the care of the wife during her lifetime, and after the testator's death, with a clause providing for the care of the testator's daughter, and with other clauses of a strictly and purely testamentary character. The just construction, therefore, is that this clause, too, was meant to operate for the benefit of the wife after the testator's death. It would violate a just rule of construction to wrench the clause providing for the annuity from its associate clauses and give it a meaning peculiar to itself, and at variance with its connectives.

The language of the particular clause under discussion is: "Said Rhodes is for to pay me \$250, by the first of January in each year, commencing January, 1875, during the natural lifetime of myself and wife." There is here a time fixed for the commencement of the payment of the annuity, and that is during the testator's lifetime, and this may not be, in strictness, a testamentary disposition; but it by no means follows that it vitiates that part of the clause which is such a disposition. The provision for the payment, during the lifetime of the wife, is certainly as clearly of a testamentary character as any other part of the instrument. The time of payment commences before, but continues after, the testator's death.

Considered under strict legal rules, the clause secures the annuity to the wife if she survives the husband. The rule is, that an obligation or duty to pay an annuity to husband and wife during their lives secures the annuity to the survivor, although there are no express words creating a right of survivorship. *Douglas v. Parsons*, 22 Ohio St. 526; *Merrill v. Bickford*, 65 Me. 118. This rule here harmonizes with the intention of the testator, as manifested in the great

body of the provisions of his will, and ought not to be broken in upon because of the ignorance or unskilfulness of the draftsman of the will.

Faulty expressions and inaccurate words can not be permitted to defeat a testator's intention, if there be enough to disclose it; nor will detached clauses be allowed to thwart it, if it can be discovered from all the provisions taken together. The general intent, not particular phrases, controls, and this intent overrides all merely special or particular expressions. 1 Redf. Wills, 433. As some of the cases say, the intent is to be gathered "from all the four corners of the instrument." Every substantive provision of this will expresses the testator's desire to secure its benefits, one and all, to his wife, and, when combined, these provisions leave no uncertainty as to the intention of the testator. The last clause of the will strongly and plainly exhibits the purpose to make sure that during his wife's lifetime she shall enjoy all the benefits of the provisions of the will. It is there written, quaintly enough, "Said Rhodes for to comply with the said will during the lifetime of myself and wife." This provision extends to all, not merely part, of the testamentary clauses of the will. It includes that concerning the annuity as well as every other. We can perceive no reason for severing this provision from those with which it is associated, or for declaring it to be without the broad, sweeping conclusion of the will. There is nothing in the instrument except the words "pay me," which supplies the appearance of reason for excluding from this concluding clause the provisions creating the annuity, and the whole tenor of the instrument, as well as the language with which the expression is directly and immediately connected, shows that the testator meant that the annuity should be continued throughout the lifetime of his wife.

Where legacies are charged upon land, says Mr. Jarman, "annuities will generally be included, unless the testator manifests an intention to distinguish them." 3 Jarman Wills, 434. In this case, however, there can be no doubt upon this ques-

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tion, for the annuity is bound up with all the legacies of the will, and it is impossible to conceive a charge as existing in favor of some of the beneficiaries and not all. Under the rule acted upon in *Parks v. Perry*, 2 Blackf. 74, the widow, in case of a struggle for priority, would be preferred. We have, however, no such question here, for it is not insisted that there is a priority of right, but that an annuity is not within the rule charging legacies upon land. To the authority already referred to, we add *Mitchener v. Atkinson*, 63 N. C. 585; *Morgan v. Titus*, 2 Green Ch. 201. The annuity is in truth a legacy. The form in which it is given does not change its legal force.

Lindsey v. Lindsey, 45 Ind. 552, decides that legacies given in the manner those are here bestowed are charges upon the real estate specifically devised to and accepted by the principal devisee. In that case the court cite many cases sustaining this doctrine, and quote as expressing the rule correctly the following from Willard Eq. 489: "But where the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, although the devisee is also the executor, or is the residuary legatee of the personal estate; unless there is something in the will itself to indicate a contrary intention on the part of the testator." Judge STORY states the rule in even broader terms. 1 Story Eq. 566. In *Harris v. Fly*, 7 Paige, 421, the court said: "The testator does not in terms create an equitable charge upon the devised premises for the payment of the two legacies to the daughters. But that was not necessary; as the charge of a legacy upon the real estate of the testator, either in aid of or in exoneration of the personalty, may be and frequently is created by implication merely. * * * But where the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised." In the fifth American edition of Jarman on Wills, the editors

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have collected many cases declaring and illustrating this doctrine. 3 Jarman Wills, 402 n. Cases decided since *Lindsey v. Lindsey, supra*, declare and enforce the principle there laid down. *Wilson v. Piper*, 77 Ind. 437; *Bennett v. Gaddis*, 79 Ind. 347.

The court erred in sustaining the demurrer to the second paragraph of the complaint, and the judgment must be reversed.

WORDEN and WOODS, JJ., dissent.

Opinion filed at the May Term, 1882.

Petition for a rehearing overruled at the November Term, 1882.

No. 10,024.

TAYLOR v. MORGAN ET AL.

86	295
130	291
130	311
86	295
130	630

EQUITY.—*Law*.—Where equities are equal, the law prevails.

VENDOR AND VENDEE.—*Judgment Lien*.—*Notice*.—*Improvements*.—*Redemption*.—A purchaser of real estate must take notice of judgment liens, and if, in actual ignorance thereof, he purchases and makes valuable improvements, he can not, by paying upon the judgment the value of the property without the improvements, release the property from the lien of the judgment if not fully paid.

From the Huntington Circuit Court.

J. C. Branyan, C. W. Watkins and M. L. Spencer, for appellant.

J. B. Kenner and J. I. Dille, for appellees.

WOODS, C. J.—Complaint by the appellant to enjoin the sale of real estate on execution. The court sustained a demurrer to the complaint, and this ruling, it is asserted, was erroneous.

The facts alleged in the complaint are, that the appellant purchased and received of Thomas L. Lucas a warranty deed

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for the property, on the 17th day of May, 1878, and paid therefor \$150, the full value, and, in ignorance of any liens or encumbrances, took possession, and expended \$860 in building upon the property a house and other lasting improvements; that there were, at the time of his purchase, two judgments of record against Lucas, which were liens upon the property, and, the property having been sold by virtue of an execution upon the prior judgment, the defendant Morgan, the assignee of the second judgment, which is for \$917, and bears date April 15th, 1876, has redeemed from the sale under the first, has procured executions to be issued and levied upon the property by his co-defendant, the sheriff of the county, and has caused the same to be advertised for sale on a day named, and on that day will cause a sale to be made unless restrained; that Lucas is insolvent; that the entire value of the property, with its rents and profits, exclusive of the improvements made by the plaintiff, does not exceed \$160, which sum the plaintiff tendered the defendants, to be applied on said executions, and demanded a release of the property, before bringing the action. Wherefore, etc.

Upon these facts the appellant contends that in equity and good conscience the property is subject to the lien of the judgments only to the extent of its value, exclusive of the improvements which the appellant placed upon the land in good faith and without actual notice of the judgment liens. Reliance is placed upon *Troost v. Davis*, 31 Ind. 34, and, in addition, are cited *Pettit v. Shepherd*, 5 Paige, 493; *Jackson v. Loomis*, 15 Am. Dec. 347, note; *James v. Morey*, 2 Cow. 246; *Sharpe v. Davis*, 76 Ind. 17; *Freeman Judg.*, secs. 338, 357; *Sedgw. Damages*, 126.

It may be noted that the complaint does not show when, to whom and for what amount the sale on execution was made from which the appellee redeemed, nor that the purchaser at that sale had notice of the appellant's alleged equity; neither is it alleged that the appellee had notice of those equities when he took an assignment of the second judgment and redeemed

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from the sale under the first. It does not appear, therefore, but that there are equities in favor of the appellee in all respects as strong as those asserted in the complaint. See *Tuttle v. Churchman*, 74 Ind. 311; *Wainwright v. Flanders*, 64 Ind. 306; *Busenbarke v. Ramey*, 53 Ind. 499; *Flanders v. O'Brien*, 46 Ind. 284. When equities are equal the law takes its course.

We are of opinion, however, that in such a case the improver of property can not claim to have acted without notice of judgment liens. The records constitute notice, of which he is bound to take cognizance, and if, without a proper investigation, he chooses to expend his money in improvements, he is no more entitled to protection in this particular than in respect to the original purchase-price paid for the conveyance.

It is true, as decided in the cases cited by the appellant, as a general rule, that the purchaser gets only the title or right of the judgment defendant, subject to all outstanding equities existing at the time when the judgment lien attaches; but this does not mean, and no case cited or known to us holds, that such an equity may be created and built up after, which had no inception before, the rendition of the judgment. Such is the proposition of the appellant, and we can not assent to it. Instead of certainty and regularity, the proposed doctrine would introduce doubt and confusion, and, as often as a case should arise, would offer the temptation and opportunity for fraud and perjury.

Indeed, if the doctrine, that a purchaser at an execution sale gets only the title of the judgment defendant, had any application, it would apply as well when the improvements are made with as without, notice because, in either case, they are something which was not a part of the property as owned by the judgment debtor when the judgment was entered and became a lien. But the authorities are uniform in denying relief to one whose rights were not acquired in good faith. Improvements on land, like houses and wells, when constructed by the owner of the fee, become a part of the realty,

Powers *et al.* v. Johnson *et al.*

and he must take notice that whatever lien there may be, which can be foreclosed or enforced upon the fee, will necessarily take with the fee such permanent structures as he may have chosen to erect. See *Catterlin v. Armstrong*, 79 Ind. 514; *Applegate v. Edwards*, 45 Ind. 329; *Pierce v. Alsop*, 3 Barb. Ch. 184; *Martin v. Beatty*, 54 Ill. 100; *Freeman*, *supra*.

Judgment affirmed.

ELLIOTT, J., concurs except in respect to the doctrine of *Flanders v. O'Brien*, cited in the opinion.

No. 9751.

POWERS ET AL. v. JOHNSON ET AL.

HIGHWAYS.—*Judgment.*—*Practice.*—*Supreme Court.*—Petition to a county board for a highway thirty-three feet wide. The board appointed viewers, with directions to locate and mark it thirty feet wide, and they reported accordingly. There was then a remonstrance for want of public utility and for damages, and viewers having reported against the remonstrants, the board, by order, established the highway thirty-three feet wide. An appeal to the circuit court resulted in a similar judgment, and there was no application to that court to change or modify its judgment. That judgment and the final order of the board are questioned in the Supreme Court.

Held, that the latter, having been vacated by the judgment, could not be now questioned.

Held, also, that the judgment could not be objected to for the first time in the Supreme Court.

From the Clinton Circuit Court.

A. E. Paige and S. O. Bayless, for appellants.

L. McClurg and J. V. Kent, for appellees.

ZOLLARS, J.—Appellees filed a petition before the board of commissioners of Clinton county, asking for the location and establishment of a highway thirty-three feet wide. The notice of the petition stated that the petitioners would

ask that the highway should be thirty-three feet wide. The board made an order that the viewers should mark and lay out the highway to the width of thirty feet. The precept to the viewers ordered them to view, mark and lay out the highway thirty feet wide, fifteen feet on each side of the given line. The viewers reported that they so viewed, marked and laid out the highway fifteen feet wide on each side of the given line.

Upon the filing of this report, appellants and one Francis Powers moved to set aside and reject the report of the viewers, for the reason that it did not conform to, or correspond with, the petition for the highway.. The same parties also moved to dismiss the petition and reject the report. Upon the overruling of these motions, they filed a remonstrance on the grounds that the proposed highway would not be of public utility, and asking damages. Reviewers were appointed, and afterwards reported against the remonstrants. After the overruling of a motion to reject this report, the board made an order establishing the highway thirty-three feet wide. Appellants then appealed to the circuit court.

In the circuit court, appellants moved to dismiss the petition, and all proceedings under it, for the reason that the viewers and reviewers did not report upon a highway of the width specified in the petition, and the board did not establish a highway of the width reported by the viewers, but one three feet wider, viz., thirty-three feet. This motion was overruled, and appellants excepted. By agreement, the cause was tried by the court without a jury, and judgment was rendered establishing the highway on the line given in the petition, and thirty-three feet wide. Appellants thereupon filed their motion for a new trial. This motion was overruled. Appellants excepted, and appealed to this court.

The argument of counsel for appellants is limited to the question of the validity of the final order and judgment of the board of commissioners and the court below, establishing the highway thirty-three feet wide, the viewers having marked

Smith, Administrator, v. Goodwin *et al.*

and laid out the same thirty feet wide. Other objections, if there be any, are thus waived. *Goldsberry v. State, ex rel.*, 69 Ind. 430; *Griffin v. Pate*, 63 Ind. 273; *Tracewell v. Peacock*, 55 Ind. 572.

The questions discussed by counsel, if raised at all, were raised by the motion to dismiss; but that motion did not, and could not, call in question the final judgment of the court below. We can not tell from the record upon what theory the case was tried in the court below. Whether the questions of utility and damages were submitted to the court on the assumption that the road should be thirty-three feet wide, as stated in the petition, or thirty feet, as marked and laid out by the viewers, we can not tell. However that may be, no objection was made to the judgment, nor was any motion made to change or modify it. The objections can not be made for the first time in this court. *Ludlow v. Walker*, 67 Ind. 353; *Leonard v. Blair*, 59 Ind. 510; *Johnson v. Prine*, 55 Ind. 351; *Evans v. Feeny*, 81 Ind. 532; *McCormick v. Spencer*, 53 Ind. 550; *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 380; *Smith v. Tatman*, 71 Ind. 171.

The objection to the final order rendered by the board of commissioners is not available, for the reason that the appeal vacated that order. We find no available error in the record.

The judgment is affirmed, at the cost of the appellants.

86	300
124	451

No. 9452.

SMITH, ADMINISTRATOR, v. GOODWIN ET AL.

VENIRE DE NOVO.—*Special Finding of Facts.—Practice.*—If a special finding of facts and conclusions of law thereon do not find the facts, but merely state the evidence, a *venire de novo* should be awarded.

SAME.—For such a defective finding by the court, see opinion.

From the Boone Circuit Court.

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G. H. Goodwin and J. W. Clements, for appellant.

C. S. Wesner, for appellees.

ELLIOTT, J.—The appellant filed a petition praying for the sale of real estate pursuant to the provisions of the will of Enoch Goodwin, deceased. The appellees answered the twenty years' statute of limitations, and also that they took possession of the land under an agreement with the testator in 1852, and have since continuously held possession; that the agreement was that if they would remove from the State of Kentucky, where they were then living, and clear up and improve the land, they should become the owners; that they fully performed all the terms of the agreement on their part. The appellant replied the general denial. A special finding of facts was made, and conclusions of law, which read as follows:

“I find that Enoch Goodwin, of the county of Nicholas, in the State of Kentucky, about the year 1850, became the owner, in fee simple, by purchase, of the west half of the northwest quarter of section thirty-five (35), in township nineteen (19) north, of range one (1) west, in Boone county, Indiana; that Ebenezer H. Williams and Elizabeth Williams were the daughter and son-in-law of the said Enoch Goodwin; that they lived in Lewis county, Kentucky, and, in the month of November, 1852, moved to Boone county, Indiana, and took possession of the land above described; that their entry upon and possession of said land were, at the time, without the knowledge or consent of the said Enoch Goodwin, and he knew nothing definitely of the fact until about one year afterwards, and that their possession and occupancy have been continuous from that time to the present; that, about two years after Williams had thus taken possession, Goodwin saw him; he requested to remain on the land two or three years, until he could look about. Goodwin consented, with the understanding that he was to deliver up possession at any time Goodwin requested it. Williams then proposed to pay the tax during the time he stayed on the land, to which Goodwin

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consented, which he afterwards failed to do. Goodwin did not attempt to enforce the payment, but paid the tax himself a greater portion of the time,

“I further find that Goodwin did not intend to divest himself of the title to said land and vest it in Williams and wife, or either of them, and that they did not claim to him to be the owners thereof; that, at the February term, 1877, of the Boone Circuit Court, Goodwin brought his action against the defendants Williams, for the possession of said land, which action was dismissed and the present one was instituted; that Enoch Goodwin died in Nicholas county, Kentucky, on the — day of June, 1877, testate. In his will he nominated his son, Enoch Goodwin, his executor; that said Goodwin failed to qualify, and the plaintiff, James T. Smith, was duly appointed administrator, with the will annexed, of Enoch Goodwin, deceased; that, by the terms of said will, said land was to be sold by the executor, for the purpose of distributing the proceeds thereof among the persons therein named, and that this action is properly brought by plaintiff for that purpose.

“As conclusions of law upon the above facts, I find that the relation of landlord and tenant did not exist between Goodwin and the defendant Williams; that the possession of Williams was not under color of title, and was not adverse; that Goodwin, at any time he chose to exercise it, had the right of entry and possession; that his right of action accrued more than twenty years before his death, and before the commencement of this suit; that he slept upon his rights until barred by the statute of limitation; therefore, judgment for defendants, Ebenezer H. Williams and Elizabeth Williams.”

The special finding before us is in many respects subject to criticism. Evidence is there stated in the place of facts, and where we should have the inferences from the evidence we have the evidence itself. It has been decided, over and over again, that the special finding should not set forth the evidence but should state the facts. The rule is a salutary one. A departure from it would, in many cases, result in a con-

Thompson *et al.* v. Pershing *et al.*

fused blending of facts and evidence that would neither accurately exhibit the evidence nor justly set forth the facts, and lead to doubt and obscurity. In the case before us the appellant had a right to a finding, as a fact, upon the question whether the appellees were in possession under license from the testator, and acknowledging his title, or were holding under an adverse claim of title. Mere declarations such as those stated in the finding are evidence, but they are not facts within the meaning of the law governing special findings and special verdicts. It was the duty of the court to have examined all the evidence upon this point, as, of course, upon all the other material questions in the case, and from the evidence to have deduced and stated its conclusions. Conclusions or inferences from facts must be made and stated by the trial court, or the finding will, upon objection properly made, be deemed defective.

What purport to be conclusions of law in the case before us, are for the most part mere inferences of fact. Some of these inferences, if properly embodied in the finding of facts, must necessarily have exerted an important influence upon the case, but, when stated as conclusions of law, they are altogether out of place.

We think the appellant's motion for a *venire de novo* should have been sustained.

Judgment reversed.

No. 7342.

THOMPSON ET AL. v. PERSHING ET AL.

PRACTICE.—*Rules of Court.*—*Change of Venue.*—*Judge.*—A rule of court requiring applications for change of venue to be made by the second Tuesday of the term, unless cause be shown for delay, is valid, and applies where the application seeks a change from the judge.

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SAME.—*New Trial.*—*Causes Discovered After Term.*—There can be no error in dismissing an application for a new trial under section 563, R. S. 1881, which shows no cause for a new trial.

SAME.—*Motion to Strike Out Amended Complaint.*—Where a demurrer has been sustained to a complaint for a new trial under section 563, R. S. 1881, there is no error in striking out an amended complaint afterwards filed containing the same facts.

ATTORNEYS.—*Power to Bind Client.*—*Judgment.*—An attorney has, by virtue of his employment in a cause, such power to agree to the entry of a judgment, that his client will be bound thereby, and if, in doing so, he violate instructions, he will be responsible to the client.

From the Marshall Circuit Court.

M. A. O. Packard, O. M. Packard and J. D. McClaren, for appellants.

W. B. Hess, A. Johnson and H. Corbin, for appellees.

MORRIS, C.—Alexander C. Thompson, Lawrence Shakes, David K. Harris, James V. Bailey, Samuel Wise, George W. Carlisle and Hiram C. Burlingame filed their complaint in the Marshall Circuit Court, on the 4th day of May, 1877, against Hezekiah R. Pershing, James F. Vanvalkenburgh, William C. Edwards, Hugh Jackman, Philip S. Alleman, Napoleon B. Alleman and Lewis C. Fink, for the purpose of obtaining, as the appellants insist, a new trial in a cause in which a judgment was rendered in said court on the 3d day of April, 1877, in favor of the appellee Pershing, as trustee of Center township, Marshall county, Indiana, against the appellants and the appellees, except Pershing and William C. Edwards, on the official bond of said Edwards, as the former trustee of said township.

It appears that a demurrer was sustained to the appellants' first complaint. They amended, and a demurrer was sustained to the amended complaint. On the 8th day of March, 1878, the appellants filed a second amended complaint. The appellees filed a motion to dismiss the second amended complaint, for the reasons, as stated in the motion, "that, on the fourth day of May, 1878, the plaintiffs filed a complaint in this action upon the same grounds, and asking the same relief

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as now asked in this proceeding; that a demurrer was filed to said complaint, and, on hearing of the same, this court sustained said demurrer; that an amended complaint was filed by the plaintiffs on the 7th day of September, 1877; that a demurrer was filed by the defendants to said amended complaint, and on the 5th day of the present term sustained; that on the 8th day of the present term a second amended complaint was filed, which the defendants now move to dismiss, the facts having been twice adjudicated by the court. *Second.* Because said petition does not state facts sufficient to grant the relief prayed for."

The appellants Shakes and Bailey, on behalf of all the appellants, upon affidavit in due form, applied for a change of venue from the judge of said court. The court overruled the motion for a change of venue, on the ground that the application was made after the expiration of the time limited by the rules of the court for making such motions. And thereupon the court sustained the appellees' motion to dismiss the appellants' complaint, and rendered final judgment for the appellees.

The errors assigned question the rulings of the court upon the motion for a change of venue and upon the appellees' motion to dismiss the complaint.

Did the court err in overruling the motion for a change of venue? The rule of the court regulating applications for changes of venue is as follows:

"*Fourth.* All applications for continuance, change of venue or any other delay of a case, must be made by the second Tuesday of the term, or showing good cause in writing for the delay if made thereafter, which must accompany the application."

The application was made on the forty-second day of the term, after the second Tuesday of the term, and no showing for the delay accompanied the application.

The appellants insist that the circuit courts of the State have

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no authority to adopt rules regulating the disposition of business in said courts upon any subject upon which the Supreme Court has not adopted rules. They rest this conclusion on sec. 14, p. 9, 2 R. S. 1876, which provides that "the rules of such court shall be in conformity with those prescribed by the Supreme Court on the same subject;" that, as the Supreme Court has adopted no rule upon the subject of the change of venue, the circuit courts have no power to adopt rules upon that subject.

We think the appellants' construction of the statute untenable. The statute confers the power upon circuit courts to adopt rules in relation to the business of such courts generally. The only limitation upon this general power is that they shall not be repugnant to the laws of the State, and that they shall be in conformity with the rules of the Supreme Court upon the same subject. Obviously, the statute only requires the rules of the circuit court to conform to those of the Supreme Court upon subjects upon which the latter court has adopted rules. If, as the appellants say, the Supreme Court has adopted no rule in relation to changes of venue, the circuit courts may adopt rules upon that subject without regard to the rules of the Supreme Court.

The appellants also insist that the rule adopted by the court below is not broad enough to embrace the application made by them for a change from the judge; that the rule only applies to applications for changes of venue from the county. Counsel for the appellants say that the word "venue," in its technical, legal sense, means "neighborhood"; and that it must be understood to have been used in the rule adopted by the court below in its technical sense; and that the rule, therefore, had no application to changes from the judge. In this we think the counsel are mistaken. They have stated correctly enough the meaning of the word venue, at common law, but the phrase "change of venue" means, as used in the statute, a change from the judge as well as from the county.

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2 R. S. 1876, p. 116, sec. 207. And, in this sense, the phrase must be understood to have been used in the rule in question.

As the application for a change of venue was made after the time limited by the rules of the court below, and accompanied by no showing accounting for or explaining the delay, there was no error, we think, in overruling the motion. *Redman v. State*, 28 Ind. 205; *Galloway v. State*, 29 Ind. 442; *Reitz v. State, ex rel.*, 33 Ind. 187; *Bennett v. Ford*, 47 Ind. 264,

Did the court err in dismissing the appellants' second amended complaint?

It appears from the record of the original suit in which a new trial is sought, that all the defendants to that suit except Edwards appeared by attorney and jointly answered the complaint of Pershing, admitting the execution of the bond sued on, but denying every other allegation of the complaint, and asking that the question of suretyship be determined. Edwards also answered the complaint. A denial of the several answers by Pershing put the case at issue. It was, by agreement of the parties, submitted to the court for trial. The record states that "after hearing the evidence adduced, the arguments of counsel, and being fully advised, the court finds for the plaintiff, and that all the material allegations of the complaint are true. The court further finds that the defendant William C. Edwards is the principal, and all the other defendants are his sureties, upon the bond sued on, and that there is now due, of principal and interest, on said bond, the sum of \$7,148.66."

The evidence upon which this finding was made by the court is not contained in the complaint for a new trial, nor is there anything in the complaint for a new trial which tends to impeach or in any way question the correctness of the above finding of the court. If the complaint is to be regarded as an application for a new trial under section 356 of the code of 1852, 2 R. S. 1876, p. 183, there could hardly be any error in dismissing it. It neither presents nor pretends to present any reason for setting aside this finding of the court.

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The language of the record sustaining the motion to dismiss the appellants' complaint is: "The motion to strike out amended complaint is sustained, to which the plaintiffs except."

As we understand the motion to strike out the second amended complaint, one of the reasons upon which it is asked to be done is, that the amended complaint contained the same facts contained in the first and second complaints filed by the appellants for a new trial. The record does not show whether the motion to strike out the second amended complaint was sustained for the above reason, or for the reason that the amended complaint did not contain facts sufficient to entitle the appellants to relief. Assuming that the motion was sustained for the reason first above named, we can not say that the court erred. The original complaint filed for a new trial is not in the record, and for anything that appears in the record the original complaint may have contained the same facts which are alleged in the amended complaint stricken out by the court. Under such circumstances there would be no error in striking out the amended complaint and rendering judgment against the appellants on the demurrer to their original complaint.

After the court had made its general finding in the original action, as above stated, the record stated that William C. Edwards paid into court on his own behalf, to be applied on the principal and interest due upon said bond, the sum of \$4,500, which was accepted by the plaintiff Pershing, leaving due on said bond the sum of \$2,648.66. The record states that the equitable share due from each of the eleven sureties, the other defendants, is \$240.78; that Hugh Jackman, James F. Vanvalkenburgh, Philip S. Alleman and Napoleon B. Alleman come and pay over, to be applied on said bond, the sum of \$250 each, leaving \$1,813.52 to be paid by the other seven sureties on said bond. The record then states "that by the agreement of all the defendants made in open court, in consideration of the payment of said \$4,500 by the defendant William C. Edwards, as aforesaid, the amount above found

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due, to wit, \$1,813.52, is to be collected first from the surety defendants who had not paid, or, if they failed, from the other sureties, and no judgment is to be rendered against the said Edwards in this action, but that nothing in this agreement or finding should be construed so as to prevent the said sureties each from prosecuting to final judgment against said Edwards any claim or demand he may have on account of payments made on this judgment or the bond upon which it was rendered. The court further finds that of the above sum found due," etc. Judgment was rendered in accordance with the finding.

The complaint states that the appellants Shakes and Wise never employed any attorney to appear for them, or either of them, in said action, and it is averred in the complaint that they and the other defendants never authorized any attorney to make any agreement for them in said cause; that the sole object of the defendants to said action, other than said Shakes and Wise, was to secure the entry of a proper judgment in favor of said Pershing as trustee of said township, and against said Edwards as principal, and themselves as his sureties, for the amount due on said bond; that, for this purpose, they employed an attorney to appear for them in said action. It is averred that said Edwards had real estate in said county and State, upon which any such judgment would operate as a lien, and of sufficient value to pay any sum that might be found due on said bond; that their object was to secure such lien, and thus protect themselves as the sureties of said Edwards, and that they so informed their said attorney; that since the rendition of said judgment said Edwards has disposed of and so encumbered his real estate as that it can not now be made available for their protection; that the agreement, upon which said judgment was rendered, was made by their attorney, and without authority, and in fraud of their rights; that the appellants believed that the amount paid into court by the said Allemans, one of whom is the son-in-law of said Edwards, was furnished to them by said Edwards;

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that in this way, and through the exercise of an undue influence by the said Allemans over their said attorney, who was also the attorney of said Allemans, and the aid furnished them by said Edwards, the agreement upon which said judgment was taken was fraudulently made, to the prejudice and injury of the appellants; that the plaintiff in said action, by encouraging, acquiescing in, and accepting and acting upon, said agreement, became a party to said fraud. It is alleged that these facts were not known by appellants until after the adjournment of the term of court at which judgment was taken.

If Shakes and Wise did not employ the attorney who appeared for them, they might, perhaps, in a proper proceeding, have procured a stay of proceedings on said judgment against them, for the purpose of obtaining relief against the same so far as it may have been founded upon the alleged unauthorized agreement. *Wiley v. Pratt*, 23 Ind. 628. But the complaint in this case does not present this question for decision. *Kendel v. Judah*, 63 Ind. 291.

The allegation in the complaint, that the attorney of the appellant had no authority to make the agreement upon which the judgment was rendered in the original action, must be understood to mean that the appellants had not, in fact, authorized him to make the agreement. But, by employing him to appear for them in the action as their attorney, they did impliedly authorize him to make such agreement. An attorney may, without express authority, bind his client by agreement that judgment may be taken against him, and that, too, though the attorney know that his client has a good defence to said action. If he acts contrary to the express directions of his client, or to his injury, the client must look to the attorney for redress. *Hudson v. Allison*, 54 Ind. 215.

We do not think that the facts stated in the complaint for a new trial show that Pershing, the plaintiff in the original action, was guilty of any fraud or of such misconduct as would have justified the court below in granting a new trial, or in

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opening up the judgment for the purpose of setting aside the agreement pursuant to which the judgment was rendered. We conclude that there is no available error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the cost of the appellants.

No. 8758.

NUGEN ET AL. v. FIRST NATIONAL BANK OF CAMBRIDGE
CITY.

FRAUDULENT CONVEYANCE.—*Complaint to Set Aside Fraudulent Liens.*—*Insolvency.*—In a complaint by a creditor to set aside fraudulent liens upon the debtor's property, the insolvency of the debtor is well shown by averments to the effect that at and from the date of the liens to the commencement of the action, the debtor had no property subject to execution except that upon which the liens had been placed.

SUPREME COURT.—*Bill of Exceptions.*—*Evidence.*—Questions dependent on the evidence will not be considered on appeal if it be apparent that parts of the evidence are not included in the bill of exceptions.

From the Henry Circuit Court. •

W. Grose, for appellants.

M. E. Forkner, for appellee.

WOODS, C. J.—The appellee brought the action for the purpose of setting aside as fraudulent against creditors certain conveyances and transfers of real and personal property, and removing certain mortgage and judgment liens alleged to have been created and suffered in furtherance of the fraudulent design. The appellant Silas R. Nugen, who alone assigns error upon the record, was the grantee and holder of some of the alleged fraudulent conveyances and liens, and is alleged to have participated in the fraudulent purpose of his co-defendants, the debtors of the appellee.

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It is claimed that the complaint is insufficient on demurrer, because a bill of particulars of the personal property in respect to which relief was sought was not filed with the pleading. The objection, if good, is not available, because, in respect to the real estate and the encumbrances put upon it, it is clear that the complaint was not demurrable. It is claimed further that the insolvency of the debtors and their want of property sufficient to pay their debts, both at the time of the alleged fraudulent transactions and at the commencement of the suit, are not well averred. The decision in *Brucker v. Kelsey*, 72 Ind. 51, is cited; but, under the rule declared in that case, the complaint is good. It is alleged that the debtors "are each and all of them wholly insolvent, and were insolvent at the time of the several acts * * complained of, and have no property out of which the plaintiff's debt can be made, except that which is hereinafter named, and did not have at the time of the acts complained of." It is insisted that the exception in this averment is fatal to its sufficiency; but it appears from the subsequent allegations that the property referred to in the exception was all embraced in the mortgage and in the sales upon execution, which are alleged to have been fraudulently made, and for the cancelling of which the action was instituted. It is also alleged that the plaintiff had recovered judgments in the circuit court upon which executions had been issued, which had been returned unsatisfied, because no property subject to levy could be found, and that, before bringing this action, the plaintiff had caused other executions to issue, which were yet in the hands of the sheriff, who "is deterred from levying the same on the property * * by reason of the fraudulent judgments, liens and claims," etc. As against the objections made to it the complaint is unquestionably good.

The remaining questions discussed by counsel for the appellant—there is no brief before us for the appellee—require a consideration of the evidence, and, while there is a bill of exceptions in the record which purports to contain all the evidence, an examination shows that letters and other writings

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and documents were read in the case which are not set out in the bill or in connection with it. The questions, therefore, are not before us; *Morris v. Stern*, 80 Ind. 227; yet we have so far examined them as to become convinced that if the transcript were perfect the judgment could not be reversed.

Judgment affirmed.

No. 10,602.

THE STATE v. BURRELL.

CRIMINAL LAW.—*Public Indecency.*—*Pleading.*—In a prosecution under section 1995, R. S. 1881, for using obscene language in the presence of women, an affidavit or indictment which fails to state the language alleged to have been used by the defendant, or an excuse for not stating it, is insufficient.

From the Jackson Circuit Court.

F. T. Hord, Attorney General, *W. T. Branaman*, Prosecuting Attorney, and *D. A. Kochenour*, for the State.

ELLIOTT, J.—The affidavit upon which this prosecution is founded professes to charge the appellee with a violation of section 1995 of R. S. 1881, by using obscene language in the presence of women. The affidavit is defective for the reason that it does not state the language which the appellee is alleged to have used, or give any excuse for not stating it. The allegation that the accused used obscene and licentious language is the statement of a conclusion, and not the averment of a fact. The pleader ought to have given the language used by the defendant, and thus enabled the court to conclude as a matter of law whether it was within the statute.

Judgment affirmed.

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No. 9370.

McTAGGART v. DOLAN.

PROMISSORY NOTE.— *Principal and Surety.*— *Agreement.*— *Consideration.*— *Mortgage.*— *Release.*— *Judgment.*— *Execution.*— M. and D. executed their joint note to another, D. being in fact surety of M. Afterwards, in consideration that M. execute with D. a release of a mortgage held by both against another party, D. agreed to pay the note. D. received from the mortgagor lands to the amount of the mortgage so released; but liens on these lands were afterwards discovered which D. was compelled to pay, equal in amount to the price at which he took the lands, and therefore he never delivered the release to the mortgagor.

Held, that the agreement of D. to pay the note was founded on a sufficient consideration; that there was no failure of that consideration, and the agreement of D. with M. to pay the note so changed their relations that, in equity, M. became the surety of D.

Held, also, that, in a suit against both on the note, M. might establish the facts and obtain an order under the statute (R. S. 1881, section 1212), that execution on the judgment should be first levied on D.'s property.

From the Cass Circuit Court.

J. W. McGreevy, D. B. McConnell and C. B. Lasselle, for appellant.

M. Winfield and Q. A. Myers, for appellee.

MORRIS, C.—Alexander R. Shroyer commenced a suit against the appellant and the appellee, upon a note executed by them to him for \$400. The suit was originally brought in the court of the city of Logansport, and afterwards appealed to the circuit court.

The appellant filed an answer to the complaint of Shroyer, admitting the execution of the note, and that it was unpaid. He also filed a cross complaint, in which he alleged that, after the execution of the note by him and his co-defendant Dolan, as stated in the complaint, on the 29th day of August, 1876, the said Dolan, in consideration that he (McTaggart) would then execute with Dolan a receipt in writing, which he did execute with said Dolan, releasing the sum of \$600 due upon a mortgage on certain real estate in the city of Logansport,

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before that time executed by one Laughlin to them to indemnify them as sureties on certain liabilities of said Laughlin, and which sum of \$600 said Dolan had, before that time, received and appropriated to his own use by the purchase and sale of certain property belonging to said Laughlin, and which he should have applied on said note and mortgage, agreed with the appellant to assume and pay the note sued on; that appellant could not produce said receipt, for the reason that the same had been left by Laughlin in the possession of Dolan; that, by said agreement, Dolan became in equity liable on the note in suit as principal, and that he, McTaggart, became liable as surety for said Dolan. The prayer is that the judgment recovered on the note may be first made of the property of Dolan, etc.

Dolan filed a demurrer to this cross complaint, which was overruled. Judgment was rendered on the note in favor of the plaintiff below, Shroyer, and against McTaggart and Dolan, and continued as to the parties to this appeal.

Dolan answered the cross complaint of McTaggart in four paragraphs, to the third and fourth of which McTaggart demurred. The demurrer was overruled as to the third and sustained as to the fourth paragraph. The appellant excepted to the overruling of his demurrer to the third paragraph of the answer.

The appellant replied by a general denial to the appellee's answer to the cross complaint. The cause was submitted to a jury who found for the appellee. The appellant moved for a new trial. The motion was overruled, and judgment entered declaring the appellant principal and the appellee surety on the note sued on.

The errors assigned are that the court below erred in overruling the appellant's demurrer to the third paragraph of the appellee's answer to his cross complaint, and in overruling his motion for a new trial.

The appellee insists that this appeal should be dismissed, for the reason that the record shows that judgment was ren-

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dered on the note in favor of Shroyer against McTaggart as principal and Dolan as surety, and for the further reason that Shroyer is not made a party to the cross complaint of the appellant.

As to the first point, the appellee is mistaken. The record shows that Shroyer took his judgment at the February term, 1878, against both the makers, and it is expressly stated at the conclusion of the entry of the judgment, that the question of suretyship between the makers is left open. If Shroyer was not formally a party to the cross complaint, the fact will not authorize a dismissal of the appeal.

The question discussed by counsel, and it is the only question in the case, is, did the court err in overruling the appellant's demurrer to the third paragraph of appellee's answer to his cross complaint.

The answer states, that the appellant and appellee were sureties on certain obligations of Daniel Laughlin, and that, to indemnify them as such sureties, they took from Laughlin his note, secured by a mortgage on real estate in Logansport, for \$600; that the appellee and appellant were liable as sureties of Laughlin, in the sum of \$800, one-half of which was to be borne by each; that Dolan paid his half of the \$800, and the appellant borrowed the \$400 for which the note in suit was given, and that the appellee signed it as surety; that the appellee afterwards purchased property of Laughlin, for which he was to pay \$600; that it was agreed that he should pay the note sued on with a part of the \$600, he also agreeing to procure a receipt for the amount to be executed by him and McTaggart, to apply in discharge of the mortgage held by Dolan and McTaggart as indemnity; that McTaggart agreed to and did execute such receipt, in consideration that the appellee would pay the note in suit; that McTaggart knew that the consideration for the receipt was the \$600 of purchase-money in appellee's hands; that, before the delivery of the release or receipt to Laughlin, the appellee discovered that there were unpaid taxes and unsatisfied liens upon the property

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purchased by him of Laughlin, exceeding in amount the \$600 which he was compelled to pay ; that he had, after paying such liens, nothing in his hands with which to pay said note ; that he destroyed said receipt or release, and that said indemnity mortgage, so released, is still in force and unsatisfied, and still exists as indemnity against the liability of the appellant as the surety of said Laughlin ; that the consideration of the appellee's promise to pay the note has, therefore, failed.

The demurrer raises the following questions :

First. Was the agreement on the part of the appellee, as stated in this paragraph, founded upon a sufficient consideration ?

Second. Has the consideration, if any, failed ?

Third. If there was a sufficient consideration for the appellee's promise, and it has not failed, what is its effect upon the relations of the parties to the note in suit ?

First. The agreement of the appellant to release his interest in the indemnity mortgage held by him and the appellee upon the property of Laughlin, was clearly a sufficient consideration for the promise of the appellee to assume and pay the note given by the parties to Shroyer, whether the appellant was principal in said note or not. This is hardly denied by appellee's counsel. The execution and delivery of the release or receipt by the appellant to the appellee, which is admitted by the answer, was a complete execution of the contract on the part of the appellant.

Second. The appellant having executed the contract on his part by a delivery of the stipulated release, there could be no failure of the consideration. It was the execution of the release by the appellant, not the money which the appellee owed Laughlin, that constituted the consideration of the appellee's promise to pay the note due to Shroyer. The consideration which passed between Dolan and Laughlin was a matter between them, with which the appellant has nothing to do and for the failure of which he was not responsible.

The destruction of the release was the work of the appel-

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lee, and, unless assented to by the appellant, could not affect his rights. Had it been averred that after knowledge of its destruction, the appellant had, by suit to foreclose or otherwise, asserted a right to the mortgage released, a different question would be presented. There is no such averment in this paragraph. It is not shown, we think, that the consideration for the appellant's promise to pay the note executed by the parties to Shroyer had failed.

Did the agreement of the appellee to pay the note sued on change the relation of the parties to the note, and was the plaintiff below bound, after notice of the facts, to recognize their relations if changed?

Counsel for the appellee say:

"The agreement upon which the appellant relies does not make him surety, and, therefore, he is not entitled, in the first instance, to be declared surety by a cross complaint; he simply holds an agreement, by the terms of which Dolan is to pay the note in suit. It not being a part of the original transaction, it can not be made the subject of a cross complaint in this action."

In the case of *Williams v. Fleenor*, 77 Ind. 36, it was held that the complaint of a surety, under secs. 674 and 675 of the code, is not a cross complaint. The object of the proceedings is to ascertain the relations of the makers of the note, as between themselves, to it and to each other. The instrument determines, usually, their relations to the payee. As to him, all the makers are principals, unless it is otherwise provided in the instrument; but, while this is the case, equity will oblige the payee to recognize and act with reference to the equitable relations, when ascertained, of the parties liable on the instrument. The trial of the question of suretyship proceeds between the parties to that question, and when, as between them, their relations are determined, the court, by its judgment, settles the order in which the judgment plaintiff shall proceed on execution. The liability of the makers to

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the payee may be determined at one time and the question of suretyship at another. If, through the agreement of the makers of the note in suit, their relations to it became changed, so that the appellee in equity became the principal debtor and the appellant his surety, it was competent for the court to so adjudge in this action, and, upon ascertaining the fact, provide that execution upon the judgment previously rendered in favor of Shroyer should be first levied of the property of the appellee.

In the case of *Colgrove v. Tallman*, 67 N. Y. 95, it was held that when an agreement had been made upon the dissolution of a co-partnership between two persons, that one of the partners should take the partnership property and pay the partnership debts, the partner agreeing to pay the firm debts became the principal debtor and the other his surety, and that a creditor having notice of the agreement was, in equity, bound to observe it.

Brandt on Suretyship, sec. 23, says: "When one member of a partnership retires from the firm, and the remaining members agree with him to pay the firm debts, and these facts are known to the creditor, the member so retiring will be considered, in law, a surety."

In such and all similar cases an agreement upon sufficient consideration, made subsequent to the creation of the debt and the note or instrument securing it, changes the relation of the debtor or debtors to the instrument or debt. *Williams v. Boyd*, 75 Ind. 286, and cases there cited.

We think the cross complaint of the appellant sufficient; that the third paragraph of the answer was bad, and that the demurrer to it should have been sustained.

Though the release by the appellant of the Laughlin mortgage extinguished his interest in it, it does not follow that it is to be deemed satisfied as to Laughlin. Equity may keep it alive for the benefit of the appellee.

PER CURIAM.—It is ordered by the court, upon the fore-

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going opinion, that the judgment below be reversed, at the costs of the appellee, with instructions to the court to sustain the appellant's demurrer to the third paragraph of the appellee's answer, with leave to the appellee to amend his answer.

No. 9494.

HUNTER, ADMINISTRATOR, v. FRENCH.

DECEDENTS' ESTATES.—*Administrator's Petition to Sell Real Estate to Pay Debts.*—*Appeal.*—An administrator might, under the act concerning decedents' estates in force in 1876, appeal within one year from a judgment against him on a petition to sell real estate to pay debts.

SAME.—*Answer.*—*Fraudulent Claim.*—To an administrator's petition to sell lands to pay debts, an answer is good on demurrer, which avers that the personal estate was sufficient to pay all just debts; that the administrator seeks to sell the lands to pay an unjust claim, the allowance of which was procured by the fraud of an heir who had brought suit for partition which resulted in a sale of the lands to the defendant at a full price.

From the Warren Circuit Court.

J. W. Sutton, for appellant.

J. M. Rabb and *J. McCabe*, for appellee.

FRANKLIN, C.—Appellant, as the administrator of the estate of Elizabeth Oxer, deceased, filed a petition for the sale of real estate to pay the debts against said estate. The heirs of the deceased and appellee French were made defendants thereto. French answered specially, that at the time of said Elizabeth's death she had plenty of personal property to pay all her indebtedness, and that her said heirs undertook to settle the estate without administration; that they had paid all the valid claims against said estate except \$17 of a physician's bill, and that there was yet plenty of her personal estate to pay that; that afterwards one of said heirs, Mary J. Mayer, and Samuel Mayer, her husband, commenced in said court

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proceedings to have partition made of the real estate, under which a sale was ordered, a commissioner was appointed to make the sale, and appellee purchased it from the commissioner; that he gave the full value therefor, and after he had paid the first and second instalments, the said Mayers, without appellee's knowledge or consent, fraudulently caused said appellant to be appointed administrator of said estate, and then fraudulently filed an unfounded claim against said estate for taking care of the deceased in her last sickness, and fraudulently procured the same to be allowed by the court against said estate, without the knowledge or consent of appellee, and for the payment of which appellant is now asking to sell said real estate.

A demurrer was overruled to this answer, and a reply filed in denial. There was a trial by jury; verdict for appellee, with answers to interrogatories, stating that there were no valid claims existing against said estate; that there was nothing due Samuel Mayer; that there was nothing due Dr. Simpkins, and that there was sufficient personal property to pay the debts. Over a motion for a new trial judgment was rendered for appellee.

Appellant has assigned the following errors:

- 1st. Overruling motion for a new trial.
- 2d. Overruling demurrer to appellee's answer.
- 3d. Error in rendering judgment for appellee.
- 4th. Error in excluding evidence offered.
- 5th. Error in instructing the jury.

Appellee has filed a motion to dismiss the appeal, for the reason that under sections 189 and 190 of the decedents' act, 2 R. S. 1876, p. 557, the appeal was not perfected within thirty days after the rendition of the judgment. It is admitted that it was perfected within a year after final judgment. This is sufficient. See the case of *Bell v. Mousset*, 71 Ind. 347.

The motion to dismiss the appeal is overruled. The last two specifications are not proper in the assignment of errors.

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They may be good reasons in a motion for a new trial, but can not be considered in the assignment of errors. The third specification is too general to present any question for consideration. There is no error in the second specification; appellee's answer constituted a good defence to the petition to sell the real estate.

The remaining question to be considered is the overruling of the motion for a new trial. The reasons stated for a new trial are:

- 1st. Overruling the demurrer to appellee's answer.
- 2d. Refusing to strike out part of appellee's answer.
- 3d. Error in refusing to admit certain evidence.
- 4th. Refusing to admit certain other evidence.
- 5th. In giving instructions to the jury.
- 6th. The verdict is not sustained by sufficient evidence.
- 7th. The verdict is ~~contrary to law~~.

The overruling of the demurrer to the answer is not a proper reason for a new trial. It has been disposed of as one of the specifications in the assignment of errors.

The refusal to strike out parts of appellee's answer is not properly in the record. It is not contained in the transcript of entries; there is no bill of exceptions embracing it, and it is only mentioned by being contained in the motion for a new trial. It can not thus be made a part of the record, and is not a sufficient excuse for reversal, if in the record. As to the third, fourth and fifth reasons for a new trial, the refusal to admit certain evidence, and the instructions to the jury, appellee insists that they, also, are not properly in the record.

The case was tried at the March term of the court, 1880, and continued, with the motion for a new trial pending. At the June term thereafter, the motion for a new trial was overruled and final judgment rendered. No bill of exceptions was filed at the time that any of these rulings complained of were made, and the record does not show that at the times said rulings were made any time was given in which to file bills of exceptions. At the June term of the court, after final judg-

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ment had been rendered, appellant filed two bills of exceptions: No. 1, intended to embrace these various rulings; No. 2, the evidence. Bill No. 1 was not filed in time, and can not be considered. The evidence given alone is properly in the record, and that only can be considered. See the cases of *Backus v. Gallentine*, 76 Ind. 367; *Sohn v. Marion, etc., G. R. Co.*, 73 Ind. 77.

This case, having been tried under the code of 1852, must be governed by the 343d section thereof, 2 R. S. 1876, p. 176; but the rule in such cases, under the revision of 1881, is changed so as to bring forward all matters contained in the motion for a new trial. See sec. 626, R. S. 1881.

The evidence tended to support the verdict of the jury. The verdict is not contrary to law, and can not be disturbed by this court. There is no available error in overruling the motion for a new trial. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

No. 9042.

PLATTER v. THE CITY OF SEYMOUR.

MUNICIPAL CORPORATION.—*Construction of Public Works.*—A municipal corporation may construct ordinary public works through its officers and servants in cases where the whole expense is to be paid out of the corporate treasury, and is not bound to let such work out to independent contractors.

SAME.—*Liability for Torts of Servants.*—Where the servants of a municipal corporation, engaged in the service of the corporation, and in the construction of an authorized corporate work, commit a trespass, the municipality is liable.

SAME.—*Consequential Injuries.*—A municipal corporation is not liable for

86	323
125	344
86	323
132	474
86	323
136	615
86	323
138	226
86	323
150	308
150	431
86	323
163	126
163	384
86	323
164	430
86	323
169	641

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consequential injuries arising from the performance of a public work, where there is no want of skill or lack of care.

PLEADING.—*Demurrer*.—A demurrer does not admit all the statements contained in a complaint, but admits only such as are properly or sufficiently pleaded.

SAME.—*Construction of Pleading*.—A pleading is to be construed according to its general tenor and scope, and the construction is not to be controlled by impertinent or isolated statements.

SAME.—*Complaint Framed on One Distinct Theory*.—Where the complaint proceeds on a distinct theory, it must be construed with reference to that theory, and according to the general scope of its averments.

SUPREME COURT.—*Nominal Damages*.—A reversal will not be adjudged where the only error is a refusal to give mere nominal damages.

From the Jackson Circuit Court.

W. K. Marshall, for appellant.

F. T. Hord and *W. B. Hord*, for appellee.

ELLIOTT, J.—The principal questions which this case presents were determined in the case of *Cummins v. City of Seymour*, 79 Ind. 491 (41 Am. R. 618). The complaint before us is similar to the one passed upon in that case, but contains the additional statement that the servants of the appellee, engaged in the construction of a drain in a public highway adjoining appellant's premises, cast soil upon his land, and injured his fence. No statement, however, of the amount of damages suffered is made, and the whole drift of the complaint shows that a recovery is not sought upon the ground of a trespass on the appellant's close, but upon the ground that the appellant is entitled to consequential damages resulting from the construction of a drain in the highway.

We have no doubt that a municipal corporation may construct ordinary public works, such as a drain or ditch, by its officers or servants, and is not bound to let such work out to independent contractors. *City of Aurora v. Fox*, 78 Ind. 1; *Cummins v. City of Seymour*, *supra*. The statutory provisions upon the subject of awarding contracts for public improvements apply to cases where the work is done at the expense of adjoining property owners. Where servants of a municipi-

pal corporation, while engaged in the service of the corporation and in the performance of some work which the corporation has power to construct, commit a trespass upon land adjoining the line of the work, the municipality is liable. 2 Dillon Munic. Corp. (3d ed.), sec. 971. The general rule is, that a municipal corporation is not responsible for consequential injuries resulting from the careful and skilful improvement of a public street; but this rule does not protect it in cases where its servants wrongfully enter upon and injure adjacent land. *Town of Martinsville v. Shirley*, 84 Ind. 546; *Hendershott v. City of Ottumwa*, 46 Iowa, 658; S. C., 26 Am. Rep. 182.

If the complaint under examination can be regarded as properly stating as a cause of action that the servants of the appellee, while engaged in its service, wrongfully entered upon and injured the appellant's property, it should be held good. That the complaint contains a statement upon this subject is true, but the question is as to whether it is properly in the pleading and so sufficiently pleaded as to require consideration. It is a familiar rule that a demurrer admits only such facts as are well pleaded. It is not every fact stated in a pleading that is to be considered as admitted by a demurrer. The admission does not extend to irrelevant matters, nor to matters badly pleaded.

The complaint is a very long one, and the theory upon which it proceeds is, that the appellant has a right of action for the injuries resulting from the alleged wrongful construction of a ditch in a highway lying outside of the corporate limits of the city. The texture and drift of the complaint plainly show that the cause of action intended to be pleaded is not one of trespass for an unlawful entry upon land, but one for consequential damages resulting from the construction of a public work by a municipal corporation. The allegation as to the entry on the appellant's land is an isolated one, occupying an out-of-the-way place in the pleading, and not connected with the cause of action which the complaint was evi-

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dently meant to set forth. The statement of which we are speaking is impertinent, and of such statements a standard author says: "So also, allegations which are impertinent, or immaterial, are not confessed, by a demurrer." Gould Pl. (4th ed.) 439; *Peyton v. Kruger*, 77 Ind. 486.

A pleading is to be considered according to its general scope, and is not to be controlled by detached and isolated statements. Thus, a complaint professing to be founded on a written instrument can not be made good by an isolated and impertinent statement of the consideration of the instrument, as that it was given for goods sold and delivered. *Johnston v. Griest*, 85 Ind. 503; *Trippe v. Hunccheon*, 82 Ind. 307; *Richardson v. Snider*, 72 Ind. 425 (37 Am. R. 168); *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Kimble v. Christie*, 55 Ind. 140. Where a pleader professes to declare on a distinct and definite theory, and to state one cause of action, and that upon the theory adopted, his complaint is to be construed with respect to that theory; and, as was said in *Kimble v. Christie*, "its character, in this respect, must be determined from the general scope of its averments." *Johnston, etc., Co. v. Bartley*, 81 Ind. 406; *Judy v. Gilbert*, 77 Ind. 96 (40 Am. R. 289); *Lockwood v. Quackenbush*, 83 N. Y. 607; *Salisbury v. Howe*, 87 N. Y. 128.

To permit an isolated statement to control the scope and meaning of a long and involved pleading would be destructive of all certainty in pleading, result in injury to litigants, and impose upon the trial court the burden of looking into out-of-the-way places to discover if disconnected and irrelevant allegations existed which might change the drift of the general averments of the complaint. Such a system would make pleadings mere traps for the ensnaring of the adverse parties, and would give to pleadings a protean character, which all rules of practice condemn.

The counsel for the appellant, in his original brief, does not make any point upon the allegation we have been considering. The ground upon which he put his case is thus ex-

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pressed: "I think the averments of the complaint fully show that the defendant, in the light of these authorities, has created an actionable nuisance." The entire argument, from beginning to end, is directed to the question of the appellee's liability for consequential damages, and no comment is made upon the allegation of which we have been speaking.

If the allegation referred to could be deemed entitled to consideration, we should not be justified in reversing the judgment, for the utmost that could be claimed upon this concession would be that there was a technical trespass, and nominal damages, and it is settled that a mere right to nominal damages will not warrant a reversal. *Hacker v. Blake*, 17 Ind. 97; *Mahoney v. Robbins*, 49 Ind. 146; *Axtel v. Chase*, 77 Ind. 74; *Town of Tipton v. Jones*, 77 Ind. 307; *Atkins v. VanBuren School Tp.*, 77 Ind. 447.

Judgment affirmed.

No. 9622.

GOBLE v. DILLON ET AL.

MALPRACTICE.—Parties.—Answer.—Physician.—To a complaint for malpractice sounding in tort against two surgeons, an answer that each was separately employed is bad.

SAME.—Estoppel.—Res Adjudicata.—To a suit against two surgeons for malpractice, a separate answer by one that he had sued the plaintiff before a justice of the peace having jurisdiction, to recover for his services in the same matter, that there was an answer that the services were worthless, and a trial and judgment for the amount of the claim sued for, which remains in force, is good; but if it be alleged that the judgment was without answer, and on default, it is bad; and a reply to such good answer, that the suit for malpractice was pending when that before the justice of the peace was commenced, is bad.

SAME.—Judgment for Services.—In such action, a separate answer by one, that

86	327
126	381
86	327
126	421
86	327
150	60
150	61
86	327
165	364

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the other had recovered a valid judgment for his services in the matter, does not show a release of the one so pleading, though the judgment be sufficient to estop the suit against the defendant who obtained it.

From the Rush Circuit Court.

W. A. Cullen and *B. L. Smith*, for appellant.

J. W. Study, *G. B. Sleeth*, *J. W. Gordon* and *L. W. Florea*, for appellees.

BLACK, C.—The appellant sued the appellees for malpractice as physicians and surgeons. The complaint alleged that on the 10th of January, 1880, the appellant's leg was broken; that the appellees were practicing physicians and surgeons in the neighborhood where the appellant resided, and as such were called upon and requested to exercise their professional knowledge and skill in adjusting and setting said broken bone, and cure and heal the same; that they undertook the same as such physicians and surgeons, for a reasonable fee, to be thereafter paid them; that, without any fault on appellant's part, the appellees so negligently, unskilfully and unprofessionally treated and set said limb, that the same was and is six inches shorter than the other limb, and six inches shorter than it would have been if properly, skilfully and professionally treated and adjusted: that, in consequence thereof, he has been rendered a cripple for life, and greatly injured in locomotion, and rendered less capable of maintaining himself and family, and has suffered damages in the sum of five thousand dollars, for which he demands judgment.

The appellees answered separately, each by a general denial and by paragraphs of special defence. Demurrers to all the special paragraphs were filed. The demurrer to the second paragraph of the appellee Dillon's answer, and those to the first and second paragraphs of the answer of the other appellee, Hobbs, were overruled. The demurrers to the other paragraphs were sustained.

The appellant replied to the paragraphs of answer which had been held sufficient on demurrer, and each of the appel-

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lees demurred to the reply to his answer. These demurrers were sustained. The appellant, having excepted to the rulings upon the demurrers to his replies, refused to reply further, whereupon judgment was rendered for the appellees. The assignment of errors presents for our consideration the rulings upon the demurrers to the second paragraph of Dillon's answer, the first and second paragraphs of the answer of Hobbs, and the replies.

In his second paragraph of answer the appellee Dillon alleged, in substance, that he and his co-defendant, the latter to aid and assist, were, each separately and for himself, employed by the appellant, each for a reasonable compensation, to be paid him severally by the appellant, and that this defendant's employment was not a joint employment with said Hobbs. The pleading then alleges, at length, that on the 2d of October, 1880, before a certain justice of the peace, this defendant filed his complaint, setting forth therein that the appellant was then and there indebted to this defendant in the sum of sixty-five dollars; that this demand was made for and on account of "said services, care, skill and diligence by this defendant bestowed in and upon the adjusting, setting, treating and curing of said broken leg."

There are allegations showing the jurisdiction of the justice of the peace, and it is averred that afterward, on the 6th of October, 1880, said cause came on to be tried before said justice, and the appellant appeared thereto, and, for answer to the complaint, alleged, "that said services mentioned in said complaint, and for which judgment was therein asked for said sum of sixty-five dollars, by and in favor of this defendant and against said Goble, were entirely worthless and of no value whatever."

It is alleged that there was a trial, and the case was submitted to said justice upon the complaint and answer, and, the evidence of the plaintiff and defendant being heard, said justice found for, and rendered judgment in favor of, the appellee Dillon, and against the appellant, for the sum of sixty-five

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dollars. It is further alleged that the judgment so recovered was and is for and in consideration of this defendant's services mentioned in appellant's complaint herein, and that said judgment still remains unappealed from, unsatisfied and in full force in favor of this defendant and against said Goble.

The first paragraph of the answer of the appellee Hobbs is like the second paragraph of Dillon's answer, transposing the names of Dillon and Hobbs, except that the action alleged therein to have been brought by Hobbs before the same justice, against the appellant, for services, is said to have been brought on the 19th of October, 1880. It is alleged that the amount claimed and recovered was thirty dollars, and that the trial and the rendition of judgment were on the 24th of November, 1880, and it is not alleged that the appellant appeared to the action, nor shown that he was defaulted, and there is no allegation of the issuing or the serving of summons, nor is it alleged that the judgment was duly given; but it is averred that the justice, when the complaint was filed, and at all times thereafter until he rendered, entered and signed said judgment, had full and complete power, authority and jurisdiction in and of said action and of the subject-matter thereof, and of the person of said Goble, to render, enter and sign said judgment.

By his second paragraph of answer, the appellee Hobbs set up the rendition of the judgment given in the action of the appellee Dillon against the appellant, before the justice, in much the same language that was used by Dillon in the second paragraph of his answer, above set forth, except that the character of the appellant's answer before the justice is not stated, the allegation concerning it being that Goble appeared and "pleaded to said action." And it is claimed in said second paragraph, that, by suffering said judgment in favor of Dillon, and allowing it to remain unappealed from and in force, the appellant elected to settle with and release said Dillon from all actions and rights of action set forth in appellant's complaint against the appellees, and, in fact, released said

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Dillon from all actions and rights of action arising out of any supposed failure of the appellees or either of them to use proper and legal skill, care, attention and diligence in and about the setting and adjusting of appellant's broken leg, mentioned in the complaint, and in healing, curing and restoring said limb; and that the appellant is, therefore, barred and estopped to set up or prosecute his said claim and demand for damages against this defendant.

Transcripts of the judgments in said actions before the justice are filed with the answers, and referred to therein as exhibits. The filing of these copies was not necessary or proper. The pleadings are not thereby rendered bad on demurrer, but they are not aided. The transcripts could not be considered by the court below in ruling upon the demurrers, and can not be examined by this court in reviewing such rulings. *Wilson v. Vance*, 55 Ind. 584; *Richardson v. Jones*, 58 Ind. 240; *Mull v. McKnight*, 67 Ind. 525; *McSweeney v. Carney*, 72 Ind. 430; *Briscoe v. Johnson*, 73 Ind. 573.

By the second paragraph of Dillon's answer it is shown that in his action before the justice there was an answer of Goble that amounted to a special denial of the value of Dillon's services, so pleaded as to avoid a negative pregnant. *Scovill v. Barney*, 4 Oregon, 288; *Lynd v. Pickett*, 7 Minn. 184. Besides this special denial, it must be considered that the general denial was also in. *Howard v. Kisling*, 15 Ind. 83. So, it may be said in regard to the second paragraph of the answer of Hobbs, if Goble appeared before the justice and pleaded any plea, whatever its character, the general denial was in by virtue of the statute. *Howard v. Kisling, supra*.

If it be admitted that in the first paragraph of the answer of Hobbs the jurisdiction of the justice was properly or sufficiently shown, it is not alleged that there was any pleading for the defendant, or that he appeared; and we may consider that in the action of Hobbs for services the judgment was rendered upon default.

A final judgment of a court having jurisdiction, rendered

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upon the merits of the cause of action and still in force, when specially pleaded, concludes the parties to an issue thereby determined, and their privies, as to each other, from litigating the same cause of action in a collateral proceeding.

That there may thus be *res judicata*, the particular controversy sought to be concluded, the allegation which is the foundation of the second action, must have been involved in the former action so that it must or might have been tried and determined. If so involved, it will be presumed to have been determined. What was so involved in the former case must be determined from its pleadings. *Sharkey v. Evans*, 46 Ind. 472; *Bottorff v. Wise*, 53 Ind. 32; *Griffin v. Wallace*, 66 Ind. 410. A final judgment settles and concludes every mere defence that was or might have been urged against the cause of action upon which it is based, whether there was an answer setting up a defence or the judgment was rendered upon default; but it is not conclusive as to a cross action, that is, an independent, affirmative cause of action in favor of the defendant against the plaintiff, unless that cause of cross action was, in fact, involved in the issues of the former case, either as a set-off, a counter-claim or a defence. *Green v. Glynn*, 71 Ind. 336; *Bigelow Estoppel*, 2d ed., 20, 101, 107.

In New York it has become an established doctrine that in an action to recover compensation for medical or surgical services rendered by the plaintiff, wherein judgment is given in his favor, the question of the care and skill of the physician or surgeon is necessarily adjudicated. In *Bellinger v. Craigue*, 31 Barb. 534, it was decided that such question had been adjudicated, where, in the action to recover for the services, there had been an issue made by an answer of general denial.

It was so held in *Gates v. Preston*, 41 N. Y. 113, where, in the action for the services, there had been judgment by confession; and it was there said that the same rule applied to a judgment by default, by which the right of action is by implication admitted. Again, it was so held in *Blair v. Bartlett*, 75 N. Y. 150 (31 Am. R. 455), where, in the action for the

services, the defendant had appeared and put in an answer which he afterward withdrew.

These cases in the Court of Appeals proceed upon the theory that malpractice, which, of course, is hurtful, can not be of any value, and that, therefore, a judgment giving compensation for the performance of the services is inconsistent with the existence of malpractice ; that litigation provoked by either party necessarily involves the matter upon which both must rely, and hence, if there be a judgment for the services, an action for negligence and unskilfulness can not afterward be maintained if the former judgment be pleaded, and this, it would seem, without regard to the character of the issue in the action for the services, or whether or not there be any real issue—whether in that action the negligence and unskilfulness be specially pleaded, or there be a denial or an express confession of judgment, or a default. The party in whose favor the cause of action for malpractice exists is driven, at all events, to defeat the action for the services.

It is said (*Dunham v. Bower*, 77 N. Y. 76, 33 Am. R. 570), that the principle of recoupment does not apply to these cases. Recoupment admits the right of the plaintiff to sue. The defendant proceeds upon the theory that the complaint sets forth a legal demand, which he seeks to cut off, in part or wholly, by his own claim. According to these authorities, the defendant in the action for the services can not use his claim for damages as a counter-claim, but only as a defence ; and if it be or be not used as a defence, and there be a recovery against him, he can not have his cross action. The former judgment being inconsistent with the idea of the existence of malpractice as a defence, it is thereupon held to be inconsistent with its existence as an affirmative cause of action. See *Schwinger v. Raymond*, 83 N. Y. 192 (38 Am. R. 415). These cases in the Court of Appeals, and cases announcing a contrary doctrine in other States and in England, are reviewed in Bigelow Estoppel, pp. 99–108, and the New York cases are disapproved by that learned author. He says, on page 104 :

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“If there is a separate and independent cause of action given to each party upon a breach of the contract by the other, neither can be compelled to allege his defence of a breach in a suit by the other. * * Every cause of action carries with it the right to put it into judgment; and that there is a separate and independent cause of action given to each party results necessarily from this fact, that either party may sue the other for a breach. No suit can be maintained except upon a legal ground of action. Now, as one cause of action can not in itself alone, when merged in judgment, carry another and independent cause of action with it, it is difficult to understand how a judgment for the plaintiff without plea can extinguish a counter right of action by the defendant, however closely connected the two claims may be. Every one has the right to try his own case.”

In *Sykes v. Bonner*, 1 Cin. Sup. Ct. 464, an action to recover damages of the defendant, a physician and surgeon, for “carelessly, negligently, and improperly” treating the plaintiff’s arm, the defendant pleaded a judgment rendered upon default, in the court of a justice, against the present plaintiff and in favor of the present defendant, for his services in said treatment. A demurrer to this plea was sustained. The court said: “It was certainly not necessary, in order to entitle the plaintiff in that case” (before the justice) “to recover, that he should prove that he was not guilty of any negligence in his professional treatment. * * There were no pleadings and no issues. There is nothing in the record to show that the question of negligence was involved.” The court had the New York cases before it, and denied their doctrine.

Ressequie v. Byers, 52 Wis. 650, S. C., 38 Am. R. 775, is a case like the one last cited. It was held that a judgment in the court of a justice, upon default, in favor of a physician, for professional services, is not a bar to an action brought by the defendant therein against the plaintiff therein, for malpractice in respect to the same services. It is said, that “It was certainly not necessary, in order to entitle the plaintiff in

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the justice's court to a judgment, that he should prove he was not guilty of any negligence. * * The issue in this action was not necessarily involved in the justice's suit." The right of the defendant in the action before the justice to recoup his damages is stated, and it is said, that "The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case."

Other cases inconsistent with the doctrine of the New York Court of Appeals may be found abstracted in Bigelow on Estoppel, and in the notes appended to the last named case, in 38 Am. R. In this State, it has been decided that, in an action to recover compensation for professional services, negligence and unskilfulness in the performance thereof may constitute matter of counter-claim, which could not be but by recognizing the claim for the services as valid, except as it is overcome by the cross demand. *Reilly v. Cavanaugh*, 29 Ind. 435; *Nave v. Baird*, 12 Ind. 318.

The pendency of the appellant's action in the circuit court could not debar him from setting up the same demand as a counter-claim before the justice. *Wiltsie v. Northam*, 3 Bosw. 162; *Harris v. Hammond*, 18 How. Pr. 123.

If he had used his cause of action as a counter-claim, the amount of his recovery must have been within the jurisdiction of the justice. But it was optional with him whether he would so set up his grievance, or would sue upon it in another action brought by himself,—that is, continue the prosecution of his action already commenced. The right of the defendant to omit to set up a counter-claim, and afterward maintain an action against the plaintiff therefor, is recognized by the code. 2 R. S. 1876, p. 64, sec. 60.

In the action before the justice, the appellant might make use of the malpractice as a defence. See *Howell v. Goodrich*, 69 Ill. 556. If he chose to set it up by any form of issue, and that issue was adjudicated against him, he can not again litigate it.

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If, then, there was an issue before the justice, under which the same evidence would have been admissible that would enable the appellant to recover in his action in the circuit court, it will be presumed, for the purposes of the demurrer, that the question of negligence and unskilfulness was adjudicated before the justice.

The statute in relation to justices of the peace provides (sec. 34, 2 R. S. 1876, p. 612), that "All matter of defence, except the statute of limitations, set-off, and matter in abatement may be given in evidence without plea." It is said in *Howard v. Kisling, supra*, that this statute in effect provides, like the statute of 1843, that "the defendant in a suit before a justice, shall always have the benefit of the general issue, without pleading it;" and it is customary to say, having reference to this statute, as we have said above, that in actions before a justice the general denial is in by statute.

This statute excepts set-off as a matter of defence, which it is not. No reference is made in this statute to counter-claim, which is provided for in the civil code, where it is expressly distinguished from matter constituting a defence. Sec. 60. It seems, therefore, that matter of counter-claim, as such, should be specially pleaded before a justice. To hold otherwise would be to deprive the defendant of his right to bring his own action upon his own cause, which is expressly saved to him by statute. See *Howard v. Kisling, supra*.

But it is not necessary, perhaps, to decide as to this; for unskilfulness and negligence of an attorney in conducting a case in court may be shown as a defence, under a denial, in an action brought by him to secure the value of his professional services in said case, for the purpose of proving that the services were not worth the sum charged and sued for, and as evidence tending to disprove the plaintiff's right to recover anything, and as matter directly responsive to the allegations of the complaint. *Bridges v. Paige*, 13 Cal. 640. See *Terry v. Sickles*, 13 Cal. 427.

So, in an action for the value of services of a mechanic, the

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defendant, under the general denial, may prove that the work was unskilfully done; as the general denial puts in issue the value of the work. *Raymond v. Richardson*, 4 E. D. Smith, 171. See *Schermerhorn v. Van Allen*, 18 Barb. 29, and *Bellinger v. Craigue*, *supra*.

Therefore, under the general denial, which was in for better or worse, the appellant might have defeated the claim of Dillon before the justice with the same evidence that would entitle him to recover in the circuit court.

A default admits the cause of action and all the material and traversable averments of the complaint. As to the amount sued for in such an action as that of Hobbs, which was upon a *quantum meruit*, a default admits that something is due the plaintiff from the defendant, but no more than a nominal amount. Upon an assessment of damages after a default, the defendant can not, for the purpose of defeating a recovery, prove that the contract sued on was not performed, or any substantive defence as such, so as to secure a judgment for the defendant as to the cause of action. Evidence which, under a general denial, might defeat a recovery by the plaintiff, will not, after a default, have that effect. *Briggs v. Sneghan*, 45 Ind. 14, and authorities there cited.

If, before the justice, there was a default upon the defendant's failure to appear, it would not be necessary for the plaintiff Hobbs to disprove malpractice in order to recover for his services; and no evidence could be introduced by the defendant Goble for the purpose of disproving a cause of action, or a right to recover something for those services. He could not prevent a judgment for Hobbs upon the cause of action, and, therefore, an adjudication that the services were rendered, and that they were of some value. But such an adjudication could only determine the relative value of the services, and not their absolute value; for it would be made without an issue involving the question of malpractice as a cause of action or as a defence to an action. And while such a judgment

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upon default would be conclusive as to malpractice, and every other matter as mere defence, yet, the negligence and unskillfulness not having been involved, in fact, either by way of counter-claim or defence, the adjudication would not be conclusive as to a cross action for the malpractice.

The appellant had a right to control his own action. If it were otherwise, and he were required, before proceeding with his action, to defeat the suits before the justice, he might thus be driven to the trouble and expense of thrice establishing his cause of action; once for the purpose of defeating a claim of \$65, again for the purpose of defeating a claim of \$30, and again to recover in his own action, which, assuming his complaint to be true, involved great damage, and required the investigation and solution of perhaps intricate and difficult questions. By doing nothing before the justice, he might control his own action; or he might confess judgment before the justice without thereby being precluded from pursuing his cross action. But if he should set up and litigate his cause of action as a counter-claim, he could not maintain the same claim in a collateral action, but would be required to content himself with a recovery within the jurisdiction of the justice; and if he became a party to an issue under which he might have urged the matter of his claim as a defence, it was necessary for him to succeed in defeating a recovery against him, or he must fail in his own action afterward; unless he might show that, in fact, the subject-matter of his actual defence did not embrace his cause of action, which is a question not before us in this case.

It has been convenient in the discussion of this subject, for the purpose of illustrating by authorities, to speak of malpractice as provable under the general denial. Having illustrated its dual character as matter of defence and matter of counter-claim, it may be proper to say that it is not necessary, under the section quoted from the statute concerning justices, to refer the right to prove negligence and unskillfulness by way of defence to a supposition that an answer of denial is in,

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though not pleaded. The defence being one not among those required by the statute to be specially pleaded, if the defendant appear and there be a trial, and judgment be given against him on the merits, as in the case of Dillon, it will be presumed, in a collateral proceeding between the same parties, that such matter was litigated as a defence, because it was provable, whatever the character of the answer, or without any answer.

In New York *res judicata*, as to the negligence and unskilfulness, is made to depend upon the former judicial determination of the question of the value of the services, in the absence of any necessary consideration of the injury to the defendant, which, if considered, but not otherwise, would have led to a determination that the services were valueless. Such an estoppel may well be characterized as odious. One is struck with the frequency with which, in the reported cases, the suits for the services have been brought after the commencement of the actions for malpractice, as if for the purpose, which is sometimes declared, of preparing a defence for those actions. We have spoken of the hardship which may be imposed upon the plaintiff in the action for malpractice, if he be required at all events to defeat the claims for professional services. We are unwilling to extend the estoppel beyond the requirement of established principles.

In the second paragraph of Dillon's answer and the first paragraph of the answer of Hobbs, and in the briefs of counsel for the appellees, much stress is placed upon the alleged fact that the employment of the appellees was not a joint employment. It is claimed that the appellant's complaint was upon a joint contract, and that as the second paragraph of Dillon's answer and the first of the answer of Hobbs allege that the appellees undertook and promised severally, and not jointly, and that the appellant promised them severally, and not jointly, to pay each of them what his services might reasonably be worth, therefore, each of these paragraphs presented a bar to the action; and further, that the judgments

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pleaded by the three paragraphs under discussion settle conclusively that the appellees were not joint contractors, and that the appellant is, therefore, estopped from insisting to the contrary.

The appellant was entitled to sue for his injury either as upon contract, or in tort, as for a breach of duty imposed by law upon the physician, whether on hire or not. Though his pleading is not in good form, we think that upon a reasonable construction of the language employed, according to its ordinary meaning, the complaint was in tort. No promise of the appellees is alleged. The word "undertook," taken with the context, may perhaps be said to be used in the sense of *entered upon*, and not in the sense of *promised, engaged or became bound*.

It is not alleged by whom the appellees were called upon and requested, or by whom they were to be paid a reasonable compensation, and if the allegation that "they undertook the same," etc., can be said to be an averment of a promise, it is not stated to whom the promise was made. It was not necessary to allege that it became or was the duty of the appellees to act with due and proper skill, etc. 1 Chit. Pl., 16th Am. ed., 399; 2 Chit. Pl., 16th Am. ed., 607; *Scudder v. Crossan*, 43 Ind. 343; *Staley v. Jameson*, 46 Ind. 159 (15 Am. R. 285), and authorities cited.

An averment tantamount to the allegation of an express promise was absolutely necessary in a declaration in assumpsit. 1 Chit. Pl., 16th Am. ed., 309; *Candler v. Rossiter*, 10 Wend. 487. Under our system of pleading, if from the facts alleged in the complaint a promise would be implied by law, it need not be alleged. *Gwaltney v. Cannon*, 31 Ind. 227; *Wills v. Wills*, 34 Ind. 106. But where, as in this case, the plaintiff may declare upon his facts either in contract or in tort, it should not be assumed that the action is *ex contractu*, unless the complaint set forth a promise, for it is by the promise, instead of the entering upon the retainer or employment, that, in such a case as this, the action on the contract is distinguished from the action in tort.

It is, therefore, unnecessary to examine as to the sufficiency of these paragraphs as answers to an action *ex contractu*. If the complaint is in tort, there may be a recovery thereunder against both defendants for their joint tort, though their employment was several, and there may be a recovery against one defendant for his own tort whether there also be a recovery against the other or not. In such an action, a former judgment in favor of one of the defendants, in an action for the same tort, is not a bar in favor of the other defendant. *Lansing v. Montgomery*, 2 Johns. 382.

It is not always essential, as counsel for appellant claim, that, in order to bar an action by a former judgment, all the parties in both actions must be the same. If the appellant's cause of action was litigated in an issue made and adjudicated between him and one of the appellees, that appellee may plead the former adjudication, though the other appellee was not a party to that issue, and is unable to use the same adjudication as a defence. See *Richardson v. Jones*, 58 Ind. 240; *Davenport v. Barnett*, 51 Ind. 329.

Upon what has been said, we hold that the second paragraph of Dillon's answer was sufficient, and that the first and second paragraphs of the answer of Hobbs were bad.

We must, therefore, examine the reply to the second paragraph of the answer of Dillon, which alleges, in substance, that this action was pending in the Rush Circuit Court, and the appellee Dillon had been duly notified of the pendency thereof by the service of the necessary process, and had been summoned to appear and answer, before the suit mentioned in said second paragraph of Dillon's answer herein was commenced, tried or adjudicated as shown in said answer.

The reply to the first and second paragraphs of the answer of Hobbs was like that to the second paragraph of Dillon's answer, except that it was alleged in addition that Hobbs had appeared to this action before the commencement of his suit before the justice. The reply to Dillon's answer was bad, and

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that to the answers of Hobbs would have been an insufficient reply to a good answer.

If the appellees had independent causes of action for their professional services against the appellant, and their claims were due, they had the right to have them adjudicated in any court of competent jurisdiction. To sue upon them, they must have done so in another action than that brought by the appellant, who can not, in this action, on the ground of the prior pendency thereof, deny the right of the appellees to bring their actions before the justice.

In *Gates v. Preston, supra*, it is said: "Conceding that the effect of defeating the plaintiff's action" (for malpractice) "would have established the defendant's right to recover for his services, it would not have fixed their value, and there was no rule of law that required him to await the result of that action, before he could take proceedings to recover such value."

The judgment should be affirmed as to the appellee Dillon and reversed as to the appellee Hobbs.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment as to the appellee Dillon be affirmed, at appellant's costs, and that the judgment as to the appellee Hobbs be reversed, at his costs.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

No. 9923.

COLLIER v. JONES, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Executor de son Tort*.—*Appointment of Administrator*.—*Answer in Abatement*.—*Demurrer*.—In a suit by the administrator of a decedent's estate against an executor *de son tort* of the same estate, an answer in abatement, to the effect that the administrator had been appointed by the clerk, and his appointment had not been confirmed by the court at the commencement of the suit, is bad on demurrer.

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SAME.—*General Denial.*—*Argumentative Denial.*—*Demurrer.*—*Harmless Error.*

—In such a suit, where the general denial is pleaded, the error of the court, if it be such, in sustaining a demurrer to a paragraph of answer which is merely an argumentative denial of the complaint, is harmless, and is not available for the reversal of the judgment.

SAME.—*Payment.*—In such a suit, a plea of payment is not a proper answer, and sustaining a demurrer thereto, if erroneous, is harmless.

From the Warren Circuit Court.

W. P. Rhodes and *M. Milford*, for appellant.

J. M. Rabb and — *McAdams*, for appellee.

Howk, J.—This was a suit by the appellee, as administrator of the estate of Ellen Collier, deceased, against the appellant, as executor *de son tort*, of the same estate. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, assessing his recovery at \$130.75, with ten per cent. in damages. Over the appellant's motion for a new trial the court rendered judgment on the verdict.

The first error complained of by the appellant is the decision of the court in sustaining the demurrer to his answer in abatement. In this answer appellant alleged, in substance, that this suit was commenced by the appellee, before his appointment as administrator of his decedent's estate had been approved by the court; that letters of administration on such estate were issued to the appellee by the clerk of the court, on the 26th day of June, 1881, in vacation; and that such letters had not yet been acted on or approved by the court. Wherefore he demanded that the suit abate.

This answer was clearly insufficient. In section 15 of the act of June 17th, 1852, providing for the settlement of decedents' estates (sec. 2258, R. S. 1881), it was provided that an executor of his own wrong shall be liable to an action "by any creditor or other person interested in the estate of the decedent." In *Ferguson v. Barnes*, 58 Ind. 169, it was said: "The executor or administrator of a decedent is certainly 'interested in the estate of the decedent,' and, it seems to us, is a proper person to sue an executor *de son tort*." *McCoy v. Payne*,

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68 Ind. 327. In the statute in force on and since September 19th, 1881 (sec. 2258, R. S. 1881), for the settlement of decedents' estates, it is expressly provided that "such action may be brought by the executor of the decedent or the administrator of his estate (or, if there be none such, then by any creditor or heir of the decedent), and shall be for the use of the estate of the decedent."

But the appellant's counsel say: "The appellee did not become the administrator until his appointment as such was approved and confirmed by the court, which, the answer says and the demurrer admits, was at a time *after* the commencement of his suit." This point is not well taken. In section 7 of the aforesaid act of June 17th, 1852, in force at the time, it was provided that "the proper clerk or court * * * shall grant letters of administration," etc.; and section 17 of the same act provided as follows: "Such letters, issued from a court of competent jurisdiction, shall be conclusive evidence of the authority of the person to whom they are granted, until superseded or revoked, and shall extend to all the decedent's estate." Whether the letters were granted by the court or by the clerk, they were issued from the court. The demurrer to the answer in abatement was correctly sustained.

The appellant answered in four paragraphs, in bar of the action. Of these paragraphs the first was a general denial, and each of the other three stated a special or affirmative defence. The appellee's demurrers, for the alleged want of facts, were sustained as to each of the second, third and fourth paragraphs of answer, and these rulings are here assigned as error.

The appellee alleged in his complaint that his decedent, at the time of her death, was the owner of certain articles of personal property, specifically describing them, "all of which property," appellee averred, "the defendant wrongfully and unlawfully seized upon and refused to deliver up to the plaintiff, upon reasonable request, and has since converted the same to his own use. Wherefore," etc.

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In the second and third paragraphs of his answer the appellant alleged facts which were inconsistent with the averments of the complaint; and each of the paragraphs was, therefore, merely an argumentative denial of the allegations of the complaint. As the general denial was pleaded by appellant, under which he might have given in evidence every material fact stated in either the second or third paragraphs of his answer, we are of the opinion that the error of the court in sustaining the demurrer to those paragraphs was harmless, and such an error is not available for the reversal of the judgment.

The fourth paragraph of answer was as follows: "For a further answer the defendant says that he fully paid to and for the said Ellen, his deceased wife, and to the plaintiff herein, before the commencement of this action, all debts and liabilities on account of the matters and things set forth in the complaint in this suit. Wherefore he demands judgment for costs, and all proper relief."

Appellant's counsel correctly call this fourth paragraph of answer "a square plea of payment;" and, therefore, we think that the demurrer thereto was properly sustained. The action is purely statutory. The complaint charged that appellant had unlawfully intermeddled with the estate of appellee's intestate, by seizing and converting to his own use certain specified articles of personal property, which the intestate owned at the time of her death. This charge was either true or false; and the appellant denied it. Under this denial he could have given in evidence every conceivable fact which would tend to show the falsity of the charge. If the charge was true he was liable to the statutory action. It seems to us that "a square plea of payment" is not a proper answer, in such a case.

In the motion for a new trial the only causes assigned therefor were that the verdict was not sustained by sufficient evidence and was contrary to law, and that the damages assessed were excessive. We can not, as an appellate court,

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disturb the verdict of the jury for either of these causes. There is evidence in the record tending to sustain the verdict, and we can not say that the damages were excessive.

The judgment is affirmed, with costs.

No. 10,027.

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86	346
137	247

86	346
152	630

ATTACHMENT.—Delivery or Restitution Bond.—Statute Construed.—A bond in attachment, conditioned for the delivery to the constable of the property attached or the payment of the appraised value thereof, is a bond under section 168 of the code of 1852 (sec. 924, R. S. 1881), and can not, by averment, be brought under section 172 (sec. 928, R. S. 1881). *Dunn v. Crocker*, 22 Ind. 324, doubted.

SAME.—Judgment.—Sale of Attached Property.—Upon an attachment bond, given under section 168 of the code, 1852 (sec. 924, R. S. 1881), there is no liability, unless in the action in which it was given a judgment has been rendered for the sale of the attached property, and without such judgment (in a case before a justice of the peace), a writ for the sale of the property is unauthorized.

SAME.—Personal Judgment.—Dismissal of Attachment.—The rendition of a personal judgment alone, against the defendant in an attachment suit, is equivalent to a dismissal of the proceedings in attachment.

PRACTICE.—Justice of Peace.—Appeal.—Dismissal.—A suit commenced before a justice of the peace and appealed to the circuit court may be dismissed because the complaint does not state facts sufficient.

SAME.—Action on Delivery Bond.—Appeal.—Affidavit.—Case Criticised.—The intimation in *Harding v. Mansur*, 13 Ind. 454, that, in order to show merits in an appeal from a justice of the peace, the affidavit required by section 90 of the justice's act (sec. 1516, R. S. 1881) must show an effort to use the facts stated as a defence and as ground for a new trial before the justice, disapproved.

From the Delaware Circuit Court.

G. H. Koons, for appellant.

C. E. Shipley, for appellee.

WOODS, C. J.—This action was commenced before a justice

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of the peace, who gave judgment for the plaintiff, the appellant here. The appellee appealed to the circuit court, which overruled a motion of the plaintiff to dismiss the appeal, and sustained a motion of the defendant to dismiss the action. These rulings are now brought in question.

The complaint before the justice was in one paragraph, based upon the following undertaking:

“JARIUS SMITH vs. SARAH A. CAMPBELL.	}	Before Isaiah Gayman, J. P. of Harrison Township, etc.
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“The following property, to wit:” (description omitted)
“having been attached in this action, in the hands of———,
by William R. Holt, constable, on order of attachment issued
by said justice, dated September 13th, 1880, and now redelivered to him, we bind ourselves to the plaintiff Jarius Smith, that said property shall be properly kept and taken care of, and the same, or so much thereof as shall be required to be sold on execution to satisfy any judgment that may be recovered against the defendant in said action, shall be delivered to said constable on demand, or that said defendant shall pay the appraised value of said property to the amount of said judgment and costs. [Signed] LEE SCOTT.”

It is alleged in the paragraph that the property was attached and appraised at a sum named, and that, upon the execution of this bond to the approval of the constable, that officer redelivered the property to the defendant in the action, Sarah A. Campbell, “against whom the plaintiff, on the 25th day of September, 1880, obtained judgment for \$80.50, together with costs of suit, a copy of which judgment is filed with and made a part of the complaint; that, on said day, the justice issued and delivered to said constable an order for the sale of said property, or enough thereof to satisfy the judgment; but the defendant, on demand by the constable, refused to give the property, or to pay the appraised value, or any part thereof.”

Counsel for the appellant concedes that this paragraph is

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predicated on the theory that the bond was given under the 168th section of the code of 1852 (R. S. 1881, sec. 924), but insists that, upon the facts averred in the second paragraph, which was filed by leave of the circuit court, pending the motion of the appellee to dismiss the action, it must be regarded as given under section 172 (R. S. 1881, sec. 928). The averments relied upon to support this proposition are to the effect that at the time the property was seized the attachment defendant was about to remove from the State, intending to take the property with her to the State of Missouri, whither she was going, and that, in order to enable her to regain possession of the property, the appellee, being indebted to her in a sum sufficient to make him secure, executed the undertaking; that said Sarah Campbell did remove from the State, taking the property with her, and leaving nothing subject to execution on said judgment, which she did not perform nor replevy, and has not paid. In other respects the allegations of this paragraph are not substantially different from those of the first.

The terms of the bond in suit are such, in our judgment, as to put it beyond dispute that it was given under section 168 and not under section 172. The case of *Dunn v. Crocker*, 22 Ind. 324, if itself well decided, is distinguishable in this, that there was no appraisement of the property attached in that instance, and so it may have been doubtful whether, under section 168, aided by section 790, the bond could have been enforced; but there is no such difficulty in the case before us. Section 168 requires a bond conditioned "that such property shall be properly kept and taken care of, and shall be delivered to the sheriff" (constable) "on demand, or so much thereof as may be required to be sold on execution to satisfy any judgment which may be recovered against him in the action, or that he will pay the appraised value of the property, not exceeding the amount of the judgment and costs." And where a bond is drawn, so plainly as is the one in suit, for the purpose of complying with and taking advantage of this section

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of the statute, we deem it incompetent to show by parol or by averment *aliunde*, that it was designed to operate under another provision so widely different as is section 172, which contemplates an entire release of the property and discharge of the attachment proceedings, and requires simply an undertaking "that the defendant will appear to the action, and will perform the judgment of the court."

Under section 790, defects and omissions in a bond may be supplied, and even the language of the obligation controlled and modified, to accomplish the purpose of its execution; but where, as in this instance, it was competent for the party to elect between two courses, that is to say, to give a bond under section 168, or to give one under section 172, and the bond given by its terms plainly indicates the choice, it is not for the court to force upon the party or his surety a different liability.

The undertaking being treated as given under section 168, it is plain that neither paragraph of the complaint states a cause of action, and for that reason, the suit having been commenced before a justice of the peace, it was not improper for the court to sustain the motion to dismiss. Upon such an undertaking, it is settled that there is no liability, unless in the action in which it was executed a judgment has been rendered for the sale of the attached property. So it was held, upon full consideration, in *Gass v. Williams*, 46 Ind. 253.

Each paragraph of the complaint shows that the plaintiff recovered a personal judgment, but not that a judgment in attachment was rendered; and the presumption against the pleader is that such judgment was not rendered; or, to say the least, there is no presumption in the pleader's favor in this respect. The transcript of the judgment filed with the complaint is no part of the pleading, but it may be observed that it shows only a personal judgment. The allegation that the justice of the peace, on the day of the rendition of the judgment, issued to the constable an order for the sale of the at-

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tached property, does not alter the case. Without a judgment in attachment he had no right to issue such an order.

The rendering of a personal judgment alone was equivalent to a dismissal or discharge of the proceedings in attachment. *Lowry v. McGee*, 75 Ind. 508, and cases cited.

The appellant's motion in the circuit court to dismiss the appeal from the justice of the peace was on the ground that the affidavit filed by the appellee at the time of taking the appeal was defective, because it did not show merits, and because it did not show an excuse for failing to set up the facts stated in the affidavit as a defence to the action before the justice of the peace, or as ground for a new trial in that court.

Section 90 of the act concerning the jurisdiction of justices of the peace (2 R. S. 1876, p. 634; R. S. 1881, sec. 1576) provides that "No appeal shall be allowed the defendant from a judgment before a justice on a delivery bond, unless he show, by affidavit, that he has merits in such appeal."

Assuming, without deciding, that an affidavit was necessary in this case, we find that the affidavit filed was sufficient. It shows that the bond was executed under the 168th section, *supra*—a fact shown by the complaint—and that the attachment suit in which it was executed ended in a personal judgment only. This is enough to show merit in the appeal, and nothing more is required.

There is an intimation in the opinion in *Harding v. Mansur*, 13 Ind. 454, that, in order to show merits in an appeal from a justice, it is necessary to show an effort to use the facts as a defence on the trial before the justice, and as ground for a new trial, or an excuse for the failure; but, so far as we know, such has not been the commonly accepted view of the practice, and the suggestion does not meet our approval.

Judgment affirmed.

Baldwin *et al.* v. Barrows.

No. 9278.

BALDWIN ET AL. v. BARROWS.

PRACTICE.—Instructions.—Unless the instructions given by the court are all in the record, no question will be presented in the Supreme Court on the refusal to give instructions asked by the parties.

PROMISSORY NOTE.—Negligence.—One who negligently executes a note negotiable by the law merchant can not defend against it in the hands of a *bona fide* holder; and ordinarily one who executes a note without reading it or having it read to him is guilty of negligence.

From the Putnam Circuit Court.

W. M. Ridpath, S. W. Curtis and E. S. Holliday, for appellants.

ELLIOTT, J.—The appellants complain of the modification and refusal of instructions asked by them, but they have not brought before us the instructions of the court, and we can not say that error is shown, for it may well be that the instructions given properly presented the law of the case to the jury, and embraced all material and correct legal principles relevant to the evidence. A party who complains of the refusal to give instructions must bring to us those given, as without them it can not be ascertained whether any injury was done in refusing or modifying instructions asked. It is necessary for a party asking a reversal to overcome the presumptions existing in favor of the rulings of the trial court, by affirmatively showing the errors alleged to exist, and this can only be done in the case of the refusal of instructions by incorporating in the record all the instructions given.

The evidence shows, without conflict, that the appellants became the *bona fide* holders of the note sued on before due, without notice, and for a valuable consideration, and that the appellee signed the note upon the representation that it was not a promissory note, but a mere order for medicines. It appears, however, that he was able to read; that the note was signed in the presence of his wife, who could read, and that he neither read the note himself nor asked his wife to read it,

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and signed it relying upon the representations of the persons with whom he was contracting. The law is against a recovery by the appellee. Where a man negligently signs a note negotiable by the law merchant, he can not defend against it in the hands of a *bona fide* holder, and, ordinarily, one who does sign a note without reading it is guilty of negligence. *Williams v. Stoll*, 79 Ind. 80 (41 Am. R. 604); *Woollen v. Whitacre*, 73 Ind. 198; *Ruddell v. Fhalor*, 72 Ind. 533 (37 Am. R. 177); *Cornell v. Nebeker*, 58 Ind. 425; *Indiana Nat'l Bank v. Weckerly*, 67 Ind. 345; *Woollen v. Ulrich*, 64 Ind. 120; *Noll v. Smith*, 64 Ind. 511 (31 Am. R. 131).

In *Thomas v. Ruddell*, 66 Ind. 326, the evidence was much stronger in favor of the defendant than in the present case, and it was there held that a demurrer to the evidence was properly sustained.

Judgment reversed, with instructions to sustain appellants' motion for a new trial.

No. 9755.

BIGGS ET AL. v. McCARTY.

WILL.—Construction.—Descents.—Tenants in Common.—A testator, contemplating a trip, made his will in 1849, devising certain real estate to his daughter "A. and her children," A. then having one child alive, which died in December, 1850. She had another, born November 20th, 1851, which died when three days old, and she afterwards had other children. The testator started on his trip in January, 1850, and on the 15th of November, 1851, on information of his death, the will was probated, but the date of his death was never ascertained.

Held, that it might be fairly inferred that the testator died while the second child was *in ventre sa mere*, and that A. and that child then took under the will as tenants in common, and the estate thus vested did not open to admit the children of A. born afterwards.

Held, also, that upon the death of said second child its moiety passed to its parents.

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STATUTE OF LIMITATIONS.—*Demurrer.*—*Practice.*—The purchaser of lands from heirs can not invoke the statute of limitations, R. S. 1881, section 2575, by demurrer to a complaint for their recovery, unless the complaint shows that the case is not within any of the exceptions to the statute.

From the Shelby Circuit Court.

A. Major and S. Major, for appellants.

B. F. Love and H. C. Morrison, for appellee.

MORRIS, C.—The appellants, Sanford A. Biggs, Earnest F. Biggs, John V. Biggs, Nannie L. Biggs and Enoch H. Pitts, who were the plaintiffs below, allege in their complaint that Henry Stuck, of Boone county, Kentucky, contemplating a trip to California, on the 10th day of December, 1849, made his last will and testament, devising to two of his daughters and his wife his real estate in Kentucky, in fee simple, and devising his real estate in Shelby county, Indiana, to his daughter Angeline Biggs and her children; a part of which is in controversy in this suit. The testator left Boone county, Kentucky, for California, in January, 1850, and has not since been heard from; that, at the time the will was made, Mrs. Biggs had a child living, born November 10th, 1849; she had another child born November 20th, 1851, which died November 23d, 1851. The will, upon information of the testator's death, was probated in Boone county, Kentucky, on the 15th of November, 1851; that afterwards, on the 23d day of April, 1881, the plaintiffs applied to the Shelby Circuit Court, by petition in writing, and filed therewith a duly certified copy of said will and the probate thereof, asking said court to receive the same and to order the clerk of said court to file and record the same in the record of wills, as required by law; that said will and the probate thereof were received by said court, and the clerk of said court was duly ordered to file and record the same as aforesaid, which was done; that, at the time of the making of said will, the said Angeline Biggs was the wife of Perry D. Biggs, then of Boone county, Kentucky; that she had by him the following named children, to

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wit: Earnest L. Biggs, born November 10th, 1849, who died December 4th, 1850; Cora Adelaide Biggs, born November 20th, 1851, died November 23d, 1851; a son, born in November, 1852, who died the same day; Harriet A. Biggs, born May 14th, 1856; Charles H. Biggs, born November 9th, 1858, who died July 31st, 1873; Earnest F. Biggs, born August 13th, 1861; John V. Biggs, born September 12th, 1863, and Nannie L. Biggs, born March 10th, 1868; that the said Harriet A. Biggs intermarried with Enoch H. Pitts, September 30th, 1869, and died intestate in 1880, leaving no child or descendant of a child her surviving, but leaving her husband, Enoch H. Pitts, and the plaintiffs, surviving her; that the said Angeline Biggs, the mother of the plaintiffs, died intestate in July, 1877, at the county of Randolph, in the State of Missouri, leaving the plaintiffs and the said Harriet A. Pitts, her only children, her surviving.

It is then alleged that on the 21st day of December, 1858, the said Angeline Biggs and Perry D. Biggs, her husband, sold and conveyed to Shelley Stafford the land in controversy which is part of the land devised by said testator to the said Angeline Biggs; that the same had been by the grantees of said Stafford conveyed to the defendant, who claims to be the owner of the same. It is also alleged that the said Angeline Biggs, under said will, took but a life-estate in the lands devised to her and to her children, or that she and her said children held said lands as tenants in common in fee simple; that said will of said Stuck has not been probated in any court in said county of Shelby, nor was there any certified copy of said will, and the probate thereof, recorded in the record of wills in said county of Shelby, until the same was recorded under the order of said Shelby Circuit Court, as above stated; that the appellee has been in possession of said land since 1870, receiving the rents and profits of the same, which are of the value of \$3,000. The plaintiffs pray that the court will settle and determine the rights of the plaintiffs and defendant in and to said lands, taking an account of the profits thereof, and

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order partition, etc. A copy of the will was filed with, and is made a part of, said complaint, as is also the petition of the appellants, filed in the Shelby Circuit Court, and the proceedings of said court thereon.

The appellee demurred to the complaint for the want of sufficient facts. The court sustained the demurrer, and the appellants electing to stand by their complaint, final judgment was rendered for the appellee. The sustaining of the demurrer to the complaint is the only error assigned. The appellee insists that, upon the facts stated in the complaint, he is, as against Enoch H. Pitts and Sanford Biggs, entitled, as an innocent purchaser, to the protection of section 17 of the act of May 31st, 1852, in relation to wills. 2 R. S. 1876, p. 574. The section provides that "The title of any lands or interest therein, purchased in good faith and for a valuable consideration from the heirs at law of any person who shall have died seized of real estate, shall not be impaired by virtue of any devise made by such person of the real estate purchased, unless the will or codicil containing such devise shall have been fully proved, and recorded in the office of the clerk of the court having jurisdiction, within three years after the death of the testator, except:

"*First.* Where the devisee shall have been within the age of twenty-one years, of unsound mind, imprisoned, or out of the State at the death of such testator; or,

"*Second.* Where it shall appear that the existence of such will or codicil shall have been concealed from, or unknown to such devisee.

"In which cases, the limitation specified in this section shall not commence until after the expiration of one year from the time such disability shall have been removed or such will or codicil shall have come into the control of such devisee or his representative, or have been deposited in the clerk's office of the proper court of common pleas."

It appears in the complaint that Angeline Biggs and her husband were married in Kentucky, and that she died in

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Missouri. It is not alleged, nor does it appear from the complaint, that she ever resided in the State of Indiana; nor does it appear from the complaint that any of the appellants resided in this State at any time. For anything that appears in the complaint, the appellants may have resided out of the State until the commencement of this suit, and their mother may have lived out of the State until her death, which is alleged to have occurred in 1877. If they thus lived out of the State, the statute did not run against them.

Assuming that the statute referred to applies as well to foreign as to domestic wills, a question which we do not decide, the objection to the complaint is not well taken. Unless the complaint shows upon its face that the appellants are not within any of the exceptions contained in the 17th section, the appellee must, in order to avail himself of its benefits, plead the limitation. *Milner v. Hyland*, 77 Ind. 458; *Harlen v. Watson*, 63 Ind. 143. In such case the question can not be raised by demurrer. Nor is there anything in the case of *Pitts v. Melser*, 72 Ind. 469, affecting this question, nor any of the questions presented by the appellants in this case.

The appellants insist—

First. That Angeline Biggs took a life-estate in the land devised to her and her children, and that, upon her death, her children then alive took, by way of executory devise, the remainder in fee as tenants in common, whether born before or after the testator's death, and whether he died after the death of the first child, who died Dec. 4th, 1850, and before the quickening of the second, born Nov. 20th, 1851, or died during the existence of the first or second child; or,

Second. If the testator died while the child that was alive when the will was made existed, or if he died while the child born Nov. 20th, 1851, was *in ventre sa mere*, then Mrs. Biggs and her children alive at the testator's death took as tenants in common the land in fee, which opened up from time to time, to let in after-born children.

In support of the first proposition, the appellants cite the

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following cases and authorities: *Carr v. Estill*, 16 B. Mon. 309; *Goss v. Eberhart*, 29 Ga. 545; *Sisson v. Seabury*, 1 Sum. 235; 1 Hill. Real Prop. 630, note; 4 Kent Com. 221, note to 225; *Webb v. Holmes*, 3 B. Mon. 404; *Hatfield v. Sohler*, 114 Mass. 48; *Hannan v. Osborn*, 4 Paige, 336; *Borden v. Kingsbury*, 2 Root, 39; *Righter v. Forrester*, 1 Bush, 278; *Coursey v. Davis*, 46 Pa. St. 25; *Mitchell v. Long*, 80 Pa. St. 516; *Jennings v. Parker*, 24 Ga. 621; 1 Hill. Real Prop. 512, 519, 630, note.

In the first case cited from 16 B. Monroe, the devise was to "Mary Baker Didlake and her children." Mary B. Didlake had no child, and was an unmarried infant at the time the testator made his will and at the time he died. She afterwards married a Mr. Carr, and had by him one child. She and her husband sold and conveyed the land in fee simple to Estill. Her child afterwards sued for the land and recovered it. The court, rejecting the resolution in the Wild case, held that Mary B. Didlake took a life-estate in the land devised, and that her child took the remainder in fee. The court concluded that as there was no child *in esse* at the time the devise was made who could take jointly with the mother, according to the literal import of the devise, the intent of the testator was to give to the mother a life-estate. It was argued by the court that, as the testator must have regarded the children of his daughter as the objects of his bounty, and knowing at the time that his daughter then had no children, he must have intended to provide for such future children as she might have. Without questioning the correctness of the inference thus drawn by the court, it is obvious that no such inference could obtain in the case in hearing. For, in this case, Mrs. Biggs had a child living at the time the devise was made, who could have taken jointly with her had it survived the testator. Besides, the construction adopted by the court in the Didlake case was not in accordance with the law of Indiana, where the resolution in the Wild case is held to be a part of the common law in force here.

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In the case of *Sisson v. Seabury*, 1 Sumner, 235, the devise was in these words:

"I give and bequeath to my loving grandson, Philip Sisson, all my homestead farm and housing thereon standing, lying part in said Tiverton and part in the township of Dartmouth, in the Province of Massachusetts Bay, with all my other lands, and salt meadows, and sedge flats in said Dartmouth, to him, my said grandson Philip Sisson, and to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever."

The testator died in 1777, leaving his said grandson, then eleven years old, unmarried and without children. After the death of the testator, Philip took possession of the lands, and on the 29th of March, 1814, conveyed the same to Seabury. Philip died in 1817, and after his death one of his children brought this action to recover the lands from Seabury, claiming title under the will of Thomas Sisson, on the ground that said Philip took but a life-estate therein. The question was whether the devise created an estate tail in Philip Sisson, or an estate for life only, with a contingent remainder in fee in his male children. From the last clause of the devise, to wit: "And to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs forever," Judge STORY held that Philip took a life-estate with a contingent remainder in favor of his male children. It was argued that in this way alone could the lands be equally divided amongst the male children lawfully begotten of his body and their heirs forever. Judge STORY says: "The first part of the clause is, 'I give and bequeath unto my loving grandson, Philip Sisson, etc., and to his male children lawfully begotten of his body,' etc. If the will had stopped here, there could not have been a doubt, either upon principle or authority, that it was the intention of the testator to create an estate in tail male in the devisee. In the first place, the words import a devise *in presenti*, and as the devisee had no children at the time of the will, if we construe the words,

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‘his heirs male,’ etc., as words of purchase and a *designatio personarum in presenti*, the devise becomes utterly void, from the want of proper objects *in esse* to take; so that the intention of the testator is defeated. * * * This is exactly in conformity to one of the resolutions in *Wild’s* case, (6 Co. R. 17). Now, *Wild’s* case has constantly been admitted to be good law; and relied on in many subsequent cases.”

It was held in *Wild’s* case that a devise to one and his children should carry an estate in joint tenancy, when the person named had children living at the date of the will; but that when no such children existed, the term “children” should be construed as a word of limitation, and as equivalent to issue of his body, thus creating an estate-tail general as to real estate. It would seem, therefore, that according to the reasoning of Judge STORY in the case of *Sisson v. Seabury*, cited and relied upon by the appellants, and the resolution in the *Wild’s* case, the case of *Carr v. Estill*, *supra*, was not well decided. We think neither of the cases supports the first proposition insisted upon by the appellants.

In the case of *Webb v. Holmes*, *supra*, a conveyance, made by Henry Crist and Rachel, his wife, to their daughter, Sarah Thomas, read thus: “This indenture, made and entered into this 25th day of July, 1812, between Henry Crist and Rachel his wife, of Bullitt county and Commonwealth of Kentucky, of the one part, and Francis and Sarah Thomas of the same place, of the other part, witnesseth, that for the love and good-will for them and their children, that intending to convey to Sarah Thomas a certain *dower* in lands, for the entire benefit of her and his children, do hereby, and by these presents, transfer, set over, and convey to her and her children forever, all that certain tract,” etc., “containing,” etc., “which said tract of land, with all and singular its appurtenances thereunto belonging, we do hereby transfer and convey to said Sarah Thomas and her children forever,” etc.

Sarah Thomas had four children alive at the date of the deed, and four were born after the making of the deed and be-

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fore the death of her husband. The court held that Sarah took a life-estate in the land conveyed, and that all her children took the remainder in fee. The court seem to lay some stress on the word "dower" as used in the conveyance. Unless the decision turned upon the use of the word "dower," the case is in direct conflict with that of *King v. Rea*, 56 Ind. 1, and can not be regarded as authority in this State.

In the case of *Hatfield v. Sohler*, 114 Mass. 48, the testatrix, Mrs. Coleman, devised to her daughter, Mrs. Hatfield, to her sole and separate use, free from the interference of her husband or any other person, to have and to hold the same to her sole and separate use as aforesaid, and to her children or child, or the issue of any deceased child, in equal proportions. Mrs. Hatfield had two children at the date of the will, and afterwards by a second husband had two other children. Of this devise the court say: "It is not to Mrs. Hatfield, her heirs and assigns, and contains no words extending her interest beyond her life. There are no terms used indicating an intention to give her the power of disposal during her life. The devise 'to the children or child of the said Louisa or the issue of any deceased child in equal proportions,' is inconsistent with an intention to give Mrs. Hatfield a fee or an estate in tail. These are words of purchase, and are of no effect if she took an estate of inheritance with the power of disposal. We think the intention of the testatrix was to give Mrs. Hatfield an estate for life, and the remainder to her children." The court held that the remainder opened to let in children born after the death of the testatrix.

This case differs from that before us in several respects. The devise gave the property to Mrs. Hatfield exclusively for the period for which she was entitled to hold it. Its terms did not create in her anything more than a life-estate. There was a clearly expressed purpose to give an estate to the child or children. They must take in remainder or not at all. The construction adopted was the only one by which the intention of the testator could be maintained. By section 5 of the act

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of 1843 (R. S. 1843, p. 485), which was in force at the time the will of Henry Stuck was made and at his death, it is provided that "Every devise of lands shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall manifestly appear by the will that the devisor intended to convey a less estate." Had the appellants been in existence at the time of the testator's death, it would hardly be pretended that they and their mother would not have taken the land in controversy in fee as tenants in common; and in this it differs from the case just cited.

The case of *Hannan v. Osborn*, 4 Paige, 336, is also cited and relied upon by the appellants. The devise in the will of Alexander Hannan was as follows: "I give, devise and bequeath unto my sister Mary Ann Philips, wife of Thomas Philips, of the city of New York, all the remainder of my estate, both real and personal: To have and to hold the same to her and her children, forever. But in case my said sister Mary Ann shall die, and all her children shall die, leaving no children, then my will is, that this part of my estate shall then be divided among my brother and sisters; to wit, brother John, and sisters Julianna Stone and Amelia Manchester."

It was expressly provided in New York at the time, by statute, that the intent of the party shall govern, as well in the construction of deeds as of wills. And, in view of this, the Chancellor in this case says: "The rule, that the intention of the testator, so far as it can legally be carried into effect, should govern in all devises of real estate, has always been acted upon by courts of justice; except in two or three special cases, where technical rules of law have been permitted to defeat such intent. The revised statutes having abolished the rule in *Shelley's* case, which formed one of those exceptions, and having also restored the expressions, 'die without issue,' and 'die without leaving issue,' to their natural and obvious meaning, courts of justice are now left free to give such construction to the language of a testator in his will, as to carry into effect his intention." The court further says: "By the

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common law, a devise to a man and his children as an immediate gift to both, was held to be a devise to the parent and children jointly, or to give an estate tail to the father, according to circumstances. If there were children in existence at the time, it was held that they took jointly with the parent; but if there were none, he took an estate tail by implication."

The Chancellor then further states that if, from the will, it appeared that the intention of the testator was, that the children should take the estate *only* by way of remainder after the death of the parent, then the children who were in existence at the death of the testator, as well as after-born children, took the estate as purchasers, after the termination of the life-estate of the parent. He also held that by the terms of the devise the intention of the testator was to give Mary Ann Philips a life-estate only, and that her children took the remainder, which vested in those alive at the death of the testator, opening to let in after-born children.

We think this case can not be held to support the propositions relied upon by the appellants, but that, as contended by the appellee, it is opposed to them. This is a devise to Angeline Biggs and her children; it does not appear from the language of the devise that the testator intended that Angeline should have only a life-estate, and that her children should take the estate by way of remainder in fee after her death. Therefore, in the language of Chancellor WALWORTH, if there was a child alive at the death of the testator, Angeline and such child, by the common law, took the estate jointly, or, under our statute, as tenants in common.

We have carefully examined the other cases referred to by the appellants' counsel in their able and elaborate brief, but to discuss and examine them here would extend this opinion unduly. In view of the decisions of our own court, we do not think that the first proposition relied upon by the appellants is the law. *Siceloff v. Redman's Adm'r*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295; *King v. Rea*, 56 Ind. 1.

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We admit that, as contended by the appellants, the intention of the testator, as gathered from the whole will, should, so far as it can, consistently with the rules of law, be enforced, and that it should guide courts in the construction of the will; but, as will be seen by an examination of the cases referred to by the appellants, it is not always the presumed or actual intention of the testator, but, as contra-distinguished therefrom, his legal intention, that must be enforced. The application of the rule in Shelley's case sometimes unquestionably defeats the intention and actual purposes of the testator; yet the rule has been so long adhered to in Indiana that it must be regarded as the law here until changed by the Legislature.

The devise in this case is extremely simple. Its language is: "I give and bequeath to my daughter Angeline Biggs and her children all my real estate in the county of Shelby, and State of Indiana." Angeline had one child living at the time the will was made. She did not, therefore, according to Wild's case, take an estate tail by implication.

It is alleged in the complaint that the testator's will was probated in Kentucky on the 15th day of November, 1851, upon information of the testator's death. It is also alleged that on the 20th day of November, 1851, five days after the will was probated, another child was born to Angeline, which died three days afterwards; the first child died December 4th, 1850, nearly a year before the second was born.

Upon these facts we think it fair to infer that the testator died after the quickening of the second child, and at a time when it was legally capable of taking the estate jointly, or as a tenant in common, with its mother Angeline; that consequently, upon the testator's death, by the plain terms of the devise, the land in controversy vested in the devisee Angeline and the child with which she was then pregnant as tenants in common. *Hannan v. Osborn, supra*; *Shotts v. Poe*, 47 Md. 513; *Viner v. Francis*, 2 Cox, 190; *Benson v. Wright*, 4 Md. Ch. Dec. 278.

The appellants insist that, if this should be conceded, the

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estate so vested in Angeline and her child as that it opened to let in after-born children ; that the testator knowing at the time that he made the will that Angeline had then but one child, he used the word "children" to indicate his purpose to provide for all the children which she might have ; that the use of the word "children" is inconsistent with the intention on the part of the testator to limit his bounty to the mother and child then living, or to such children as might exist at the time of his death. But to this it may be replied that the word "children" is used in a general sense, applying as well to such child or to such children as might be living at his death, as to such and subsequently born children. We have not been able to find a case like this in which it has been held that the estate opened to let in after-born children.

It is said in 2 Jarman on Wills, 702, that "An immediate gift to children (*i. e.*, a gift to take effect in possession immediately on the testator's decease) * * comprehends the children living at the testator's death, (if any,) and those only. Where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution." He further says: "In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the diminution of those shares * * as the number of objects is augmented by future births, during the life of the tenant for life."

It is obvious that the devise under consideration falls within the first, and not within the second, proposition laid down by Jarman. It falls within the first, because the gift takes effect immediately upon the death of the testator. It does not fall within the second, because there is no particular estate carved out of the thing devised, nor is there any gift over to the children. In complete agreement with Jarman is

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the case of *Jones' Appeal from Probate*, 48 Conn. 60; *Hannan v. Osborn*, *supra*.

In the case of *Shotts v. Poe*, 47 Md. 513, (28 Am. R. 485), the testator, Lewis Shotts, by his will devised all his property to his son, John Lewis Shotts. Afterwards the testator executed a declaration of trust, setting forth that, in consideration of the natural love and affection which he bore for the children of his said son, he did thereby appoint the said John Lewis Shotts trustee "for the following property for their use, and until they arrived to the age of eighteen years: \$1,500 in Baltimore City Stock, and one note of Christian Weisample for \$5,000, to take effect at my death; and when each child arrives at age, the said property to go to my son, John Lewis Shotts."

The testator died in 1857, and the will and declaration of trust were admitted to probate as testamentary papers. John Lewis Shotts had, at the date of the trust and at the death of the testator, only two children. He renounced the executorship of the will, and Poe was appointed administrator with the will annexed, who filed a bill in equity, suggesting doubts as to the construction of the will.

After disposing of some preliminary questions, the court says: "The only other question is, whether the term 'children,' used in the declaration of trust, includes children of the son, John Lewis Shotts, that may be born after the death of the testator? And upon this question there can be no doubt whatever. If there be any question that may be regarded as incontrovertibly settled, in the construction of wills or testamentary papers, it is, that an immediate gift to children, *simpliciter*, without additional description, means a gift to the children in existence at the death of the testator; provided there be children then in existence to take. In *Powell on Devises*, vol. 2, p. 302, the rule, as deduced from all the cases, is stated thus: 'That an immediate gift to children (*i. e.* immediate in point of enjoyment), whether of a person living or dead; and whether it be to the children simply, or to *all* the children; and whether there be a gift over or not, comprehends the *children living at the testa-*

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tor's death (if any), and those only; notwithstanding some of the early cases, which make the time of the making the will the period of ascertaining the objects.' To the same effect is the rule as stated by Redfield on Wills, pt. 2, p. 330; * * and the decided cases fully support the propositions thus laid down by the text-writers." See the many cases cited by the court.

We have examined with care the cases referred to by the appellants. We are aware that the case of *Coursey v. Davis*, 46 Pa. St. 25, seems to support the position of the appellants, but in so far as it does this it is opposed to our own decisions. So, too, the case in 3 B. Mon. is apparently in their favor, but, as before shown, the case is opposed to the decisions of this court. So, too, the case of *Jackson v. Coggins*, 29 Ga. 403, seems to sustain the second proposition relied upon by the appellants; while the case of *Goss v. Eberhart*, 29 Ga. 545, supports the first. But we think the clear weight of authority is the other way.

The following cases, among others, referred to by appellee's counsel, support the conclusions which we have reached: *Goodwin v. Goodwin*, 48 Ind. 584; *Glass v. Glass*, 71 Ind. 392; *Jenkins v. Freyer*, 4 Paige, 47; *Gross's Estate*, 10 Pa. St. 360; *Worcester v. Worcester*, 101 Mass. 128; *Campbell v. Rawdon*, 18 N. Y. 412; *Handbury v. Doolittle*, 38 Ill. 202; *Swinton v. Legare*, 2 McCord Ch. (S. C.) 404; *Nimmo v. Stewart*, 21 Ala. 682; *Lorillard v. Coster*, 5 Paige, 172; *King v. Rea*, 56 Ind. 1; 3 Washburn Real Prop., 3d ed., side p. 685.

In *Handbury v. Doolittle*, *supra*, it was held that if no estate intervenes between the death of the testator and the vesting of the estate in children as a class, the estate goes to the children in being at the death of the testator.

In the case of *Nimmo v. Stewart*, *supra*, it was held that if a devise be to one and his children, and he has children at the date of the will and at the death of the testator, the parent and children living at the death of the testator take jointly under the will. To the same effect is the case of *Smith v. Ashurst*, 34 Ala. 208.

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This case has been argued elaborately and with much ability on both sides. We have endeavored to consider the case with the care which its importance seemed to require, and have concluded:

First. That the devise can not be construed as giving to Angeline Biggs a life-estate in the land described in the complaint, and the remainder in fee to her children.

Second. That, upon the facts stated in the complaint, the fair inference is that the testator, Henry Stuck, died while the second child of Angeline Biggs was *in ventre sa mere*, and that, upon the testator's death, Angeline and said second child took, under said will, as tenants in common, the land in dispute; but that the estate thus vested in them did not open to let in after-born children.

Third. That, upon the death of said second child, its interest passed to its parents, and that their subsequent grantees took the whole title to said land; that there is no error in the record, and that the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be, and it hereby is, in all things affirmed, with costs.

 No. 10,181.

ARNOLD ET AL. v. WILT.

SUPREME COURT.—*Evidence.—Conflict.*—Where the evidence in a cause is in conflict, the Supreme Court must take as true that which the trial court by its finding declared to be true.

PROMISSORY NOTE.—*Want of Consideration.*—The defence of want of consideration for a note sued on is sustained by evidence that the thing given the defendant for his note was utterly worthless.

From the Blackford Circuit Court.

W. H. Carroll, for appellants.

W. A. Bonham, A. Steele and R. T. St. John, for appellee.

ELLIOTT, J.—This case comes to us upon the evidence.

86	367
165	591
86	367
167	541

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There is a direct conflict, and, as the court by which the case was tried believed that adduced in behalf of the appellee, we must take it as truly exhibiting the facts of the case. Where the evidence on one side is contradicted by that given on the other, we are to take as true that which the trial court, by its finding, declared to be true, and are not to enquire whether the court was right or wrong in its decision upon the question of what evidence was entitled to weight and credit. We are not to review the testimony for the purpose of ascertaining whether the court ought to have acted upon the evidence adduced by the party against whom the finding was made, instead of upon that given by his adversary.

Our enquiry, therefore, is limited to the question, does the evidence given on behalf of the appellee sustain the finding? The evidence shows that the promissory note upon which the action is founded was executed to one J. F. Baldwin, and by him assigned to the appellants, the plaintiffs below; that Baldwin was the soliciting agent of an association known as the Queen Marriage Benefit Association, and that the note was executed to him as such agent; that the sole consideration for the note was two certificates in this benefit association; that it ceased business within a few days after the execution of the note, and that the certificates of shares therein were of no value.

This evidence fully establishes the defence of want of consideration, because it proves that the thing given the appellee for his note was utterly worthless. The case is not that of one receiving some consideration and judging for himself of its adequacy, but that of one receiving a thing utterly destitute of value. In short, there is a total absence of consideration. *Mooklar v. Lewis*, 40 Ind. 1; *Dill v. O'Ferrell*, 45 Ind. 268; *Sinex v. Toledo, etc., R. R. Co.*, 27 Ind. 365.

It is said, however, that the appellants' assignor paid the money to the association, and that the note was, therefore, given to him for the money advanced, and was not executed for the certificates. We think the court was fully warranted in inferring from the evidence that the pretence that the money

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was advanced to the association was a mere subterfuge, and that no such advancement was made by Baldwin, and that the sole consideration of the note was the worthless certificates.

We need not examine the question whether the note was procured by fraud, nor need we enquire whether the marriage association had or had not a legal existence, for we are well satisfied that the finding of the court must be sustained upon the ground that there was no consideration whatever for the note sued on.

Judgment affirmed.

No. 9886.

COFFING v. HARDY ET AL.

86	309
156	08

PROMISSORY NOTES.—*Payable in Bank in this State.*—*Inland Bill of Exchange.*

—*Suit by Endorsee Against Maker.*—*Complaint.*—In a suit by the endorsee against the maker of a promissory note payable at a bank in this State and negotiable as an inland bill of exchange, the complaint will be sufficient, even on demurrer for want of facts, if it allege the making of the note by the defendant, a copy of which is therewith filed, the endorsement of such note to the plaintiff, and that it is due and unpaid.

SAME.—*Sufficiency of Answer.*—*Demurrer.*—In such a suit an answer that the note in suit was given without any consideration whatever is bad on demurrer for the want of sufficient facts.

SAME.—*Law Merchant.*—*Equities and Defences.*—Under the law merchant, which governs the negotiability of inland bills of exchange and fixes the liabilities of the parties thereto, the endorsee before maturity, in good faith and without notice, of a promissory note payable in a bank in this State, takes the same as against the maker thereof freed from all the equities and defences which may have existed between such maker and the payee thereof.

SAME.—*Bank in this State.*—*Defence.*—Where the note in suit purports on its face to be payable in a bank in this State, and it is claimed that such bank is not a bank within the meaning of the statute, this is matter of defence to be shown by the defendant in his answer and evidence.

From the Fountain Circuit Court.

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M. Milford and I. E. Schoonover, for appellant.

L. Nebeker and H. H. Dochterman, for appellees.

HowK, J.—This was a suit by the appellees, as the endorsees, against the appellant, as the maker, of a promissory note. The cause was put at issue and tried by a jury, and a general verdict was returned for the appellees. Over appellant's motion for a new trial, the court rendered judgment on the verdict.

The following errors are properly assigned by the appellant in this court:

1. The trial court erred in sustaining appellees' demurrer to the second paragraph of his answer;
2. The court erred in overruling his motion for a new trial; and,
3. The appellees' complaint does not state facts sufficient to constitute a cause of action.

The appellant has also assigned as errors certain matters which would have constituted proper causes for a new trial, in his motion therefor; but such matters, as we have often decided, do not constitute proper assignments of error, and, as such, present no question for our decision. *Freeze v. DePuy*, 57 Ind. 188; *Todd v. Jackson*, 75 Ind. 272; *Ramsey v. Rushville, etc., G. R. Co.*, 81 Ind. 394.

The sufficiency of the complaint was not called in question by the appellant, in the circuit court, either by a demurrer for the alleged want of facts, or by a motion in arrest of judgment; but its sufficiency is questioned here for the first time, by the assignment as error of its want of sufficient facts. It was alleged in the complaint, that, "on the 25th day of January, 1881, the defendant Smith Coffing, by his promissory note (a copy of which is herewith filed), promised to pay to John Casey the sum of one hundred and fifty dollars, with interest and attorney's fees, without any relief from valuation or appraisement laws, at Farmers' Bank, Covington, Indiana, which said note the said John Casey endorsed to the plaintiffs,

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before the same was due. The said note is due and wholly unpaid, and the plaintiffs aver, that the attorney's fees, provided for in said note, are worth two hundred dollars. Wherefore," etc. The note in suit, as shown by the copy thereof filed with the complaint, was payable six months after date to the order of John Casey, "negotiable and payable at Farmers' Bank, Covington, Indiana."

The only objection to the sufficiency of the complaint is thus stated, in argument, by the appellant's counsel: "There is no averment in the complaint that 'Farmers' Bank,' Covington, Indiana, is a bank of deposit, discount, issue, or where bills of exchange are bought and sold, or that it is a bank organized under, or pursuant to, any State or National law. How, then, can a court say that a place called 'Farmers' Bank' is a bank under and according to the law merchant? It may be a bucket-shop, or a saw-mill, or a ten-pin alley, and yet *named* 'Farmers' Bank.' The complaint does not aver that this so-called bank possesses any of the qualities requisite to constitute a bank under the law."

It is very clear, that this objection to the sufficiency of the complaint is not well taken. The complaint stated a cause of action against the appellant; good even on a demurrer thereto for the want of sufficient facts, whether the note in suit was payable at a bank in this State or not. But we apprehend that appellant's counsel have made their argument against the complaint, with a view of eking out the second paragraph of the answer, to which the court sustained a demurrer for the want of sufficient facts. This ruling of the court is assigned as error. The second paragraph of answer reads as follows:

"Defendant, for further answer to plaintiffs' complaint herein, says, that the note sued upon, in this action, was given wholly and entirely without any consideration whatever."

In section 5506, R. S. 1881, in force since July 5th, 1861, it is provided as follows: "Notes payable to order or bearer

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in a bank in this State shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover, as in case of such bills."

Under this section of the statute, the note in suit was negotiable as an inland bill of exchange, and the appellant, as the maker thereof, was liable to the appellees, as its endorsees, for the amount due thereon, whether it was given without consideration or not. The law merchant governs the negotiability of inland bills of exchange, and fixes the liabilities of the parties thereto. Under this law, the endorsee before maturity, in good faith and without notice, of such a note as the one in suit, takes the same, as against the maker thereof, freed from all the equities and defences which may have existed between such maker and the payee of the note. *Murphy v. Lucas*, 58 Ind. 360; *Burroughs v. Wilson*, 59 Ind. 536; *Bremmerman v. Jennings*, 61 Ind. 334; *Morrison v. Fishel*, 64 Ind. 177.

The note in suit in the case at bar purported on its face to be payable in a bank in this State, and was therefore negotiable as an inland bill of exchange. If, in fact, the "Farmers' Bank, of Covington, Indiana," was not a "bank in this State" within the meaning of that expression as used in the statute, the fact would have constituted matter of defence, of which the appellant might have availed himself in his pleadings and evidence. The court did not err in sustaining the demurrer to the second paragraph of answer.

There is evidence in the bill of exceptions tending to sustain the verdict on every material point, and in such case we can not disturb the verdict on the weight of the evidence. The motion for a new trial was, we think, correctly overruled.

The judgment is affirmed, with costs.

Garr et al. v. Haskett et al.

No. 10,302.

GARR ET AL. v. HASKETT ET AL.

MARRIED WOMAN.—Minor.—Necessaries.—Wedding Outfit.—Evidence.—In an action against a man and his wife for the price of goods sold and delivered to her before marriage and during her minority, evidence that she was the owner of land upon which they lived, and that the goods were women's apparel, and included a wedding outfit, although conflicting with evidence that she was supplied by her guardian and earned wages by service, sustained a conclusion of the court that the goods were in part necessities suitable to her condition in life, and authorized a finding against the defendants, and a judgment to be levied only of the real estate of the wife.

SAME.—Question of Law and Fact.—In such a case, whether the goods are necessities is a question of law, and, if deemed necessities, their quantity, quality and reasonable value are matters of fact.

From the Howard Circuit Court.

N. B. Smith and *C. N. Pollard*, for appellants.

J. C. Blacklidge and *W. E. Blacklidge*, for appellees.

BICKNELL, C. C.—The appellees brought this suit against the appellants, as husband and wife, upon an account for goods sold and delivered to the wife before her marriage. The complaint contained an averment that, by the marriage, the husband acquired a large amount of personal property, enough to pay the debt and costs, and that the wife owned real estate as her separate property.

The defendants answered jointly in three paragraphs, to wit:

1. A general denial. 2. That at the time the goods were bought the wife was a minor. 3. The statute of limitations of six years.

The wife answered separately in two paragraphs:

1. The general denial. 2. Minority.

The husband answered separately that, at the time of said purchase, his wife was a minor, and that he did not, by said marriage, acquire any property whatever.

The plaintiffs replied to the second paragraph of the wife's answer, and to the second and third paragraphs of the joint

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answer, by a general denial; and for a second paragraph of reply to the second paragraph of said joint answer, and to the second paragraph of the wife's separate answer, and for a reply to the husband's separate answer, the plaintiffs said that they admitted the minority of the wife at the time of the sale and delivery of the goods, but that the goods were necessities, essential to the comfort of the minor, and suitable to her condition in life. The issues were tried by the court, who found for the plaintiffs \$113. The defendants' motion for a new trial was overruled, and judgment was rendered against the defendants for \$113 and costs, to be levied only of the real estate of the wife. This was in accordance with the statute, 1 R. S. 1876, p. 550, sec. 3; R. S. 1881, sec. 5127.

The defendants appealed. The only error assigned is overruling the motion for a new trial, and the only reasons for a new trial, which are discussed in the appellants' brief, are that the finding is not sustained by the evidence, and is contrary to law. *Stockton v. Lockwood*, 82 Ind. 158.

The account was for \$226.59; its items were chiefly women's apparel, and were bought from time to time during a period of about twenty months, commencing when the woman was eighteen years of age; they included a wedding outfit. The woman was married to her present husband within a week after the last purchase. She was the owner of land worth \$1,200, upon which she and her husband are living. There was evidence tending to show that the goods were necessities, suitable to her condition in life, and that, during the period embraced in the account, she made all her purchases from the plaintiffs. In such a case, whether the goods are necessities is a question of law; and, if deemed necessities, their quantity, quality and reasonable value are matters of fact. *Henderson v. Fox*, 5 Ind. 489.

The court held that \$113 worth of the goods were necessities. There was evidence tending to support the finding. The appellants claim that the evidence showed that the woman was furnished by her guardian with money and clothing, and

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that these supplies, with her own earnings, viz.: \$1 a week, which her brother, at whose house she lived, testified that "he aimed to pay her," rendered anything further unnecessary. There was some conflict upon this branch of the case, but there being evidence tending to sustain the conclusions of the court, the judgment can not be set aside. *Walker v. Beggs*, 82 Ind. 45. There was no error in overruling the motion for a new trial, and the judgment ought to be affirmed, with ten per cent. damages.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants, with ten per cent. damages.

No. 9609.

BOSWELL v. WILLIAMS ET AL.

PAYMENT.—*Evidence.*—*Presumption.*—*Agreement.*—*Judgment.*—*Stay of Execution.*—*Settlement.*—*Burden of Proof.*—*Instruction.*—In an action for pasturage, evidence that at the date of a judgment against the plaintiff he agreed to pay the same in pasturage and thereby obtained a stay of execution, and further evidence that the judgment had been satisfied of record, raised a presumption of payment for the pasturage, and justified an instruction that "the plaintiff can not recover unless it appears from a preponderance of the evidence that the claim sued on was omitted intentionally or by mistake from the settlement made when the judgment was settled."

From the Benton Circuit Court.

M. H. Walker, S. P. Thompson and I. H. Phares, for appellant.

D. E. Straight, U. Z. Wiley, G. S. Behm and A. O. Behm, for appellees.

FRANKLIN, C.—Appellant sued appellees for the pasturage upon certain real estate. The third paragraph of the answer

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alleged that the contract for pasturage had been settled in the payment and satisfaction of a judgment held by appellees against appellant.

Trial by jury, verdict for appellees, and, over a motion for a new trial, judgment was rendered for appellees.

The error assigned is the overruling of the motion for a new trial. The reasons stated for a new trial are, that the verdict is not sustained by sufficient evidence, is contrary to law, and error in instructions to the jury.

The first and second reasons are expressly waived by appellant in his brief.

The instruction complained of is as follows: "If the jury find from the evidence that the judgment referred to in the contract sued upon was settled and receipted in full on August 15th, 1877, the presumption of law would be that the plaintiff's claim was then settled, and the plaintiff can not recover unless it appears from a preponderance of the evidence that the claim sued on was omitted intentionally or by mistake from the settlement made when the judgment was settled."

The judgment referred to was rendered on the 10th day of February, 1876. The receipt of payment and release of the judgment, showing satisfaction in full of principal and interest, was executed on the 15th day of August, 1877. The contract sued upon was executed on the same day of the judgment, and provided that the price of the pasturage should be credited on the judgment; that the pasturage should commence at the beginning of the pasturing season in the spring and end the 1st of October, 1876; that the pasturage should then be credited upon the judgment as of the date of its beginning, that no execution should issue until the said 1st day of October, 1876, and, should one-half of the balance of the judgment be then paid, no execution should issue until the 10th day of February, 1877.

The contract sued upon was executed as a part of an agreement upon which the judgment was rendered, and is so intimately connected with the judgment and its payment, satis-

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faction and release, that we think that a receipt and release of payment, and satisfaction in full of the judgment, were sufficient to raise a presumption that the contract sued upon was settled in the settlement of the judgment, and that it devolved upon the plaintiff to show, by a preponderance of the evidence, that the contract sued upon was omitted or by mistake was left out of the settlement of the judgment. Had the contract sued upon had no connection with the rendition, payment, satisfaction or release of the judgment, the rule would have been otherwise, and it would have devolved upon the defendants to show, by a preponderance of the evidence, that the contract was included in the settlement of the judgment, or that there was a general settlement of all matters between the parties.

Upon the proof by defendants of a general settlement, it would have devolved upon the plaintiff to show that his claim was not included in the general settlement, and proof of the settlement of the judgment cast the burden of proof upon the plaintiff, to prove that his claim, which was so connected with the payment and settlement of the judgment, was not included in the settlement.

We think there was no error in the instruction, and that there was no error in overruling the motion for a new trial. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is in all things affirmed, with costs.

No. 8247.

BROWN ET AL. v. STEWART ET AL.

HIGHWAY.—*Viewers.*—*Dismissal.*—*Practice.*—Objections to the reports of viewers furnish no ground for the dismissal of proceedings to establish a highway.

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162 403

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SAME.—Remonstrance.—Public Utility.—Damages.—Where the remonstrance against establishing a highway questions the utility of the proposed way, and also claims damages, the viewers must report upon both matters.

From the Ripley Circuit Court.

S. M. Jones, Z. T. Hazen, E. P. Ferris and W. W. Spencer,
for appellants.

G. Durbin, for appellees.

ZOLLARS, J.—This case was commenced before the board of commissioners of Ripley county, by appellees filing a petition asking for the location and opening of a highway. After a remonstrance by appellants, and an order of the board establishing the highway, appellants appealed to the circuit court. In that court appellees filed two motions, one to dismiss the appeal, and the other to remand the cause back to the commissioners for further proceedings, subsequent to the appointment of the viewers. These motions were based upon the following grounds:

“1st. The report of the viewers is a nullity, in that it does not give the width of the proposed highway, or prescribe how much land each of the owners of the land over which the road runs is to give.

“2d. The order of the commissioners to the reviewers does not describe the proposed highway as described in the petition, and the report of the reviewers is a nullity.

“3d. The final order of the commissioners in the proceedings is void.”

These motions were overruled, and appellees excepted. No cross errors are assigned in this court. Appellants filed their motion to dismiss the proceedings, for the following reasons:

“1st. The records show that the viewers first appointed by the board of commissioners failed to give the width of said road.

“2d. The said viewers failed to prescribe how much land each of the owners of the land over which the road runs is to give.

“3d. The said viewers failed to stake or mark out said proposed highway.

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“ 4th. The said second reviewers appointed by said board of commissioners exceeded their authority, and reported said highway of public utility, when they were appointed by said board for the sole purpose of assessing damages which the said Brown and Stewart would sustain in consequence of the location of said proposed highway.

“ 5th. The order of the commissioners to the reviewers does not describe the proposed highway as described in the petition, as running over the lands of William J. Brown and David H. Stewart.

“ 6th. All of the proceedings of said board of commissioners, except the reception of said petition for said proposed highway, are void, and without authority of law.”

This was overruled, and appellants excepted. After a trial by jury and the return of a general verdict for appellees, and that the proposed highway would be of public utility, appellants filed their motion for a new trial. The reasons assigned, with the exception of the fourth, are unavailing in this court, for the reason that the evidence is not in the record. The fourth reason calls in question the court's ruling upon the motion to dismiss. After the overruling of this motion, and an exception by appellants, they filed their motion to arrest the judgment. This motion was, in substance, the same as the motion to dismiss, with the following additional statements:

“*First.* Because the petition in said cause is not sufficient in law to render a judgment thereon.

“*Second.* Because the petition for the location of said highway does not designate the width of said proposed road.”

It will be seen from the record as we have set it out, that in the court below counsel on both sides contended that the proceedings before the board, at least all subsequent to the appointment of the viewers, were irregular and void. They differed as to the remedy and mode of procedure. The court agreed with neither, held the case for trial, and rendered final judgment establishing the highway.

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Counsel for appellants in their brief say, that the record shows the filing of the petition, the appointment of the viewers, and that they proceeded to view the proposed highway, and that everything was regular up to that point.

Their brief is devoted wholly to alleged irregular and illegal proceedings subsequent to the appointment of the viewers.

The first three reasons urged for the dismissal of the case, and to which most of appellants' brief is devoted, are in substance that the viewers did not stake and mark out the proposed highway, and did not state in their report the width of the said highway, and how much land should be given by adjoining owners.

The record shows that the precept from the auditor to the viewers, which was based upon an order of the board, notified them that they were appointed to view, and, if of public utility, to mark and lay out the highway thirty feet wide. The viewers, in their report, state that they made a view of the highway upon the line as given in the petition, setting it out, that the highway thus viewed was thirty feet wide, and that they "marked out said route."

This report, as well as the petition and other proceedings, shows that the highway was located upon the line dividing the lands of appellants. The statute requires that where the road is laid out upon the line dividing the lands of two individuals, each shall give half of the road. The report must be taken to mean, we think, that the line between the lands of appellants is the center of the highway viewed and marked out by the viewers. The report gives a description of the highway by route, course, distance and bounds.

The road being thirty feet wide, with the center upon the line dividing the lands of appellants, the bounds are fifteen feet on each side of that line, and it results that each owner is required to give one-half of the road. The line and boundaries being thus fixed, the words "marked out said route" show, sufficiently clear, that the requirements of the statute were complied with in laying out and marking the high-

way. The objections made to the report we think are untenable. *Hedrick v. Hedrick*, 55 Ind. 78.

The fourth objection urged in the motion to dismiss is, that the reviewers exceeded their authority in reporting the highway of public utility. This objection is not well taken in law or fact. After the report of the viewers, appellants remonstrated on the ground of damages and the inutility of the proposed road. Reviewers were appointed for the purpose of reporting upon the questions of the public utility and the alleged damages. They were properly notified of the purpose of their appointment, performed their duty, and reported upon both questions against appellants. When the questions of utility and damages are included in the same remonstrance, as may be done, it is the duty of the reviewers to report upon both questions. *Butterworth v. Bartlett*, 50 Ind. 537; *Bowers v. Snyder*, 66 Ind. 340. Appellants, having united in the same remonstrance the questions of utility and damages, are not in a position to complain that such action was taken that both questions were examined and reported upon.

The fifth reason urged in the motion to dismiss is, that the order to the reviewers did not describe the highway as running over the lands of appellants, as described in the petition. The description is exactly the same, except the order, as given to the reviewers, omits the Christian name of Stewart, giving H. Stewart instead of David H. Stewart. This objection is too technical to be available; besides it is of no consequence at all. The reviewers understood what they were to do, and did it. The notice served its purpose, and no one was or could be injured by such a variance.

The sixth reason urged in the said motion to dismiss is too general to present any question.

In their brief counsel make some question as to the sufficiency of the final order of the board establishing the highway. This objection was not made in the court below, and, besides, is of no consequence, as that final order was vacated by the appeal to the circuit court, where the case was tried

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de novo, and an order establishing the road was made by the court. Some question is also made as to whether or not the viewers and reviewers were properly sworn. No such objections were made either before the board or in the circuit court, and were therefore waived.

It will be observed that the motion by appellants was to dismiss the entire proceedings. The objections are confined to the reports of the viewers and reviewers substantially. If it should be granted that all of the objections urged in argument are well taken, yet the motion to dismiss was properly overruled. No objection to the petition is pointed out in argument. As we have said, it is expressly conceded that all of the proceedings up to the appointment of the viewers were regular. If it be conceded that the petition is sufficient, it follows that the entire proceedings should not be dismissed because of irregularities in the reports. We have not been called upon to decide anything in reference to the sufficiency of the petition. Nothing is said in argument upon the action of the court in overruling the motion to arrest the judgment, except that it presents the questions presented by the motion to dismiss. After an examination of all the questions discussed in the briefs of appellants, we are of the opinion that the judgment of the court below should be affirmed.

It is therefore affirmed, at the costs of appellants.

No. 9817.

DAILY, ADMINISTRATOR, v. ROBINSON.

PRINCIPAL AND SURETY.—*Notice to Sue.*—*Discharge of Surety.*—*Statute Construed.*—*Promissory Note.*—*Decedents' Estates.*—Suit brought in June, 1881, on a promissory note against one of two makers, averring the death and insolvency of the other. Answer that the defendant executed the note as surety for the deceased maker, who died in the county the owner of a

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large estate there, and that the plaintiff was his administrator, the estate yet being unsettled and pending in that court; that in January, 1880, after such death, the defendant served a notice on the plaintiff to sue forthwith, pursuant to R. S. 1881, section 1210; that the plaintiff did not sue within a reasonable time, or bring any proceeding upon the note until the institution of this suit.

Held, that the answer was good under the statute.

From the Clark Circuit Court.

G. H. D. Gibson, for appellant.

M. C. Hester, for appellee.

BLACK, C.—The appellant, Harrison Daily, administrator of the estate of David W. Daily, deceased, brought his action in the Clark Circuit Court, on the 14th of June, 1881, against the appellee, upon a promissory note executed to appellant on the 30th of October, 1878, payable one year after date, by the appellee and one Philip M. Daily jointly, the complaint alleging that said Philip M. Daily was dead, that his estate was hopelessly insolvent, and that he was hopelessly insolvent at the time of his death and for a long time prior thereto.

A demurrer to the second paragraph of appellee's answer was overruled, and this ruling presents the only question discussed by counsel.

In said second paragraph the appellee admitted the execution of the note sued on, but said that he executed it only as surety for said Philip M. Daily, who was the sole principal, and received the entire consideration; that, after the execution of the note, said Philip M. Daily died, in said Clark county, possessed of a large estate, personal and real, in said county; that afterward, on the 15th of November, 1879, said Harrison Daily was appointed by said Clark Circuit Court administrator of the estate of said Philip M. Daily, deceased, and then accepted said trust and entered upon the duties thereof; that since said last mentioned date said estate of said Philip M. Daily, deceased, had been and yet was pending for settlement in said court, and during all said time said Harrison Daily

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had been and yet was the administrator thereof; that, on the 26th of January, 1880, appellee served upon and delivered to appellant a notice in writing requiring him forthwith to institute an action upon said contract for the collection thereof, as follows:

“To Harrison Daily, administrator of the estate of David W. Daily, deceased: You are hereby notified to institute forthwith proper legal proceedings to collect the note given to you as administrator of said decedent by Philip M. Daily as principal and the undersigned as surety, for \$832.48, dated October 30th, 1878; else I shall claim to be released therefrom.

“Nov., 1879.

JACOB ROBINSON.”

Said second paragraph further alleged that appellant did not proceed within a reasonable time after said notice to bring his action upon said note, or to institute any proceedings whatever for the collection thereof, and that he wholly failed so to do until the institution of this suit.

Sections 672 and 673 of the code of 1852 provided, as do sections 1210 and 1211, R. S. 1881, that “Any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract;” and “If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon.”

The question is presented by the second paragraph of appellee's answer, whether a notice from the surety to the creditor, after the death of the principal debtor and pending the settlement of his estate by administration, is within the meaning of the statute.

In *Whittlesey v. Heberer*, 48 Ind. 260, an answer much like that of appellee was under discussion, and it was said that, conceding, without deciding, that in a proper case a creditor upon notice from a surety would be required to pursue the

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estate of a deceased principal, in order to preserve the liability of the surety, yet, as the creditor could not be required to go out of the State to sue, the answer then in question was defective, in that it did not show where the principal died, or where the estate alleged to have been left by him was situated, and because it did not show that administration had been had upon his estate.

In *Franklin v. Franklin*, 71 Ind. 573, the notice was alleged to have been given before the death of the principal; but the answer was held bad, as it did not show but that his death occurred so soon after the service of the notice as to prevent the bringing of an action, and it was not alleged that he left in the county or State any estate on which administration had been or could be granted, and it was not shown that he ever lived in this State, or could have been sued in its courts.

Under a statute which provided that a surety might, by writing, require "the person having such right of action forthwith to commence suit against the principal debtor and other parties liable," it was held, in *Hickam v. Hollingsworth*, 17 Mo. 475, that the surety could not, after the death of the principal, exonerate himself by notifying the creditor to present his claim against the estate of the principal, the case not being within the meaning of the statute. There was, perhaps, such a difference between the terms of the notice, in that case, and the requirement of the statute, as to make the notice insufficient, aside from the question here to be decided, under our statute.

The right of the surety to give such notice to the creditor has not been regarded, in this State, as part of the common law. It is purely statutory, and, while the statute is remedial, one seeking its benefit must bring his case fairly within its terms. *Halstead v. Brown*, 17 Ind. 202; *Driskill v. Board, etc.*, 53 Ind. 532; *Franklin v. Franklin, supra*.

The object of judicial interpretation of statutes is to ascertain the meaning which the citizen is authorized to consider

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as intended by the Legislature. The purpose of this statute seems to be to provide for the surety a mode by which, without himself first paying the debt and instituting proceedings for his reimbursement against the principal or his estate, he may put the matter in such a situation that it will be necessary for the creditor to take the initiative, and that further unreasonable delay of the creditor to do so will release the surety. The necessity placed upon the creditor by the notice from the surety has been sometimes likened to the requirement of diligence from the assignee of a promissory note. *Rowe v. Buchtel*, 13 Ind. 381; *Bernitz v. Stratford*, 22 Ind. 320; *Conklin v. Conklin*, 54 Ind. 289.

It has been held that such a notice does not operate as a requirement to sue the surety alone, as no suit against him is necessary to enable him to secure any rights against the principal. *Rowe v. Buchtel*, *supra*; *Conklin v. Conklin*, *supra*. The note might have been filed as a claim against the estate of the deceased principal, or a joint action might have been instituted thereon against the surety and the personal representative of the principal. *Braxton v. State, ex rel.*, 25 Ind. 82; *Stanford v. Stanford*, 42 Ind. 485; *Milam v. Milam*, 60 Ind. 58.

So far, then, as to institute an action upon the contract within a reasonable time and prosecute it to judgment, the notified creditor could comply with the letter of the statute; but the statute provides that he shall prosecute to execution also. If the principal had been living, and the creditor had sued the surety and the principal together, the surety would have been entitled to an order directing the sheriff to first levy the execution upon, and exhaust, the property of the principal, before a levy should be made upon the property of the surety. If, the principal being dead, the creditor had sued the surety and the administrator together, no ordinary execution could have been obtained against the estate, which must be settled by administration, its debts being paid in the order of preferment prescribed by statute. The surety would

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not be entitled to an order which would delay the creditor by compelling him to await the settlement of the estate of the principal before collecting his money from the surety. *Johnson v. Meier*, 62 Ind. 98; *Hayes v. Hayes*, 64 Ind. 243.

But where the action is against the surety and the living principal, there can be no judgment or order affecting in any manner the proceedings of the creditor, either before or after final judgment. Sec. 674, code of 1852; R. S. 1881, sec. 1212; *Smith v. Muncie National Bank*, 29 Ind. 158; *Johnson v. Meier*, *supra*. And in such cases the surety may sometimes be compelled to pay the judgment and himself wait on the principal. Yet he is not for that reason deprived of his right by notice to require the bringing of the action.

The statute is remedial, and should be liberally construed for the benefit of the surety. The expression is particular, but the reason is general. The meaning may be expanded so as to cover the purpose of the Legislature.

We think the case of the parties to this action is fairly within what it may be supposed the Legislature intended as the meaning of the statute. The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

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No. 5502.

McCammack ET AL. v. McCammack ET AL.

PRACTICE.—*Pleading.*—*Motion to Strike Out.*—*Demurrer.*—Under the code, a motion to strike out will not perform the office of a demurrer in testing the sufficiency of a paragraph of answer.

SAME.—*New Trial.*—*Weight of Evidence.*—*Verdict.*—*Supreme Court.*—Where the verdict of the jury is against the party who has the burden of the issues, and the evidence is conflicting, the Supreme Court will not grant a new trial upon the mere weight or sufficiency of evidence.

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SAME.—*Instructions Asked and Refused.*—*Must be Signed by Party or Attorney.*

—Under the *fourth* clause of section 324 of the civil code of 1852 (section 533, R. S. 1881), when, at the conclusion of the evidence, either party desires special instructions to be given to the jury, such instructions must be reduced to writing, numbered and signed by such party or his attorney, and delivered to the court. If the instructions are not thus signed and are refused, the party asking them can not be heard to complain of such refusal in the Supreme Court.

SAME.—*Vague and Uncertain Causes for New Trial.*—*Reference to Bill of Exceptions not Signed or Filed.*—Where the written causes for a new trial are too vague, uncertain and imperfect to present any question for the decision of the trial court or of the Supreme Court, such causes can not be aided or perfected by reference therein to bills of exceptions not signed by the judge or filed as parts of the record at the time of the filing of such causes for a new trial.

SAME.—*Newly-Discovered Evidence.*—*Diligence.*—Where newly-discovered evidence is assigned as cause for a new trial, the affidavits filed therewith must show that the party could not, with reasonable diligence, have discovered and produced such evidence at the trial, or they will not be sufficient to sustain such cause for a new trial.

From the Putnam Circuit Court.

S. Claypool, H. C. Newcomb, W. A. Ketcham, F. T. Brown and T. Hanna, for appellants.

D. E. Williamson and A. Daggy, for appellees.

Howk, J.—This suit was commenced on the 5th day of March, 1872, by the ancestors of the appellants against the appellees, to obtain a judgment of the court setting aside and declaring void a certain deed executed by one Thomas McCammack, the father of the plaintiffs and the defendants, to the appellee Robert McCammack. The deed in question was dated January 15th, 1868, and it conveyed one hundred acres of land, particularly described, in Putnam county, for a consideration as expressed in said deed of \$2,000. In their complaint the plaintiffs alleged among other things, that no part of the consideration expressed in said deed was either paid or promised to be paid; that long before, and at the time of the execution of said deed, the grantor therein, Thomas McCammack, “was of unsound mind and incapable of understanding and comprehending the nature, purport and effect of said

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deed of conveyance ;” and that the execution of said deed was procured by the undue influence of the appellee Robert McCammack, the grantee therein, over the said grantor, Thomas McCammack. The cause was put at issue and tried by a jury in the lifetime of the plaintiffs, the appellants’ ancestors, and a verdict was returned for the appellees, the defendants below, and the plaintiffs’ motion for a new trial having been overruled, and their exception saved to this ruling, judgment was rendered against them for the appellees’ costs on the 31st day of May, 1873.

On the 5th day of April, 1876, the appellants filed a transcript of the record of said cause in this court, and an assignment of errors, wherein they said that their ancestors, James McCammack, then deceased, and John McCammack, then deceased, “ were the plaintiffs in this action below, and that the action resulted in a final judgment against the said plaintiffs before their death ; that since said judgment the plaintiffs died, leaving these appellants as their only legal heirs and personal representatives ; and now these appellants, as such heirs and personal representatives, appeal from said judgment, and, for error, assign the following errors :

“ 1st. Error of the court in overruling the motion of the plaintiffs below for a new trial ;

“ 2d. Error of the court in overruling the plaintiffs’ demurrer to the second paragraph of the answer ;

“ 3d. Error in overruling motion to strike out said second paragraph.”

In the second paragraph of his separate answer the appellee Robert McCammack said that it was true that his father was an aged man and to some extent illiterate, but that he was always industrious and very attentive to his business, and understood and managed the same with care and considerable ability ; that during his latter days the father of said appellee lived with him, but that the plaintiffs always had access to his and their father ; that their father preferred to and did live with said appellee, partly from choice and partly from the

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fact that the plaintiff James, and others of his children, did not care to be troubled with him nor take care of him; that the said appellee had always worked for the old people, as well after as before marriage, and his father had always expressed the will and intention of repaying him for his care in that behalf; that his father, before his death, was afflicted with a cancerous affection of the face, which grew worse until his death; that some time prior to his death, for the purpose of securing that care and attention that his age and infirmities required, his father deeded to said appellee the land in controversy, expressing in the deed the nominal consideration of \$2,000, but that, in fact, the real consideration was the labor and care theretofore given his father, as well as the care, attention and expense which the said appellee might incur in nursing, doctoring and taking care of his father up to his death, for the latter of which the appellee executed a bond to his father, a copy of which was filed with said paragraph; that the appellee faithfully kept and performed his part of said contract, and cared for and nursed his father, dressed his face, and gave him every attention that his situation called for up to the time of his death, and caused him to be decently buried according to his position in life; that the plaintiffs took no notice nor concern about their father or his property until after his death, and they then and since became solicitous and much concerned about his property; and the appellee averred that his father was in full possession of all his faculties, and that at the time he made said deed he knew as well what he intended to do, and did, as the said appellee; that his father was a man of stubborn self-will, and did nothing contrary to his own will; that he could not be influenced by any outside consideration or persuasion to that which was contrary to his own preconceived notions; that the deed was his own voluntary will, uninfluenced by any consideration other than that above expressed; and that his father gave his own directions to the officer, and arranged the whole matter about the deed,

without the influence or control of said appellee ; and all other matters, not otherwise answered, were denied.

It is certain, we think, that the court committed no error in overruling the appellants' motion to strike out this second paragraph of answer. Under the code, it has often been decided by this court, that a motion to strike out will not perform the office of a demurrer in testing the sufficiency of the facts stated in a paragraph of answer, to constitute a defence to the action. *Port v. Williams*, 6 Ind. 219 ; *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248 ; *City of Elkhart v. Simon-ton*, 71 Ind. 7. The third supposed error, therefore, was not well assigned.

We are of the opinion that the facts stated in this second paragraph of answer were sufficient to withstand the plaintiffs' demurrer thereto for the want of facts. It is claimed by the appellants' counsel, as we understand them, that the paragraph was bad, because, while it purports to answer the entire complaint, it is in fact, as they insist, an answer only to the first paragraph of the complaint. We do not think, however, that the second paragraph of the answer is open to this objection. In its affirmative allegations the paragraph responds to all of the material averments in each paragraph of the complaint, and it then concludes with a denial of all matters in the complaint not otherwise answered. The second paragraph of answer was certainly an answer to all the allegations of both paragraphs of the complaint.

In their motion for a new trial the plaintiffs below assigned in substance the following causes therefor :

1. Because the verdict was contrary to law.
2. Because the verdict was not sustained by sufficient evidence, and was contrary to law and evidence.
3. Because a clear preponderance of the evidence was for the plaintiffs.
4. Because the court erred in refusing to give the jury instructions numbered from 1 to 10 inclusive, asked by the plaintiffs.

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5. Because the court erred in giving the jury, of its own motion, instructions numbered from 1 to 14 inclusive.

6. Because the court erred in the admission of improper testimony, offered by the appellees, as shown by a bill of exceptions made a part of the record.

7. Because the court erred in the exclusion of proper and competent evidence, offered by the plaintiffs, as shown by a bill of exceptions made part of the record.

8. Because the court erred in refusing to compel the appellees to allow the plaintiffs an inspection of the original account kept by the appellee Robert McCammack, for his father, for use in the cross-examination of said appellee, as shown by bill of exceptions No. 4, made part of the record.

9. Because of error and irregularity of the court in refusing to allow the witness, Scott, to repeat his testimony, as shown by bill of exceptions No. 3; and,

10. Because of newly-discovered evidence.

We will consider and decide the several questions, arising under these causes for a new trial, in the same order in which the appellants' learned counsel have presented and discussed them in their elaborate brief of this case.

Under the first three causes assigned by the plaintiffs for a new trial, the only question presented relates to the sufficiency of the evidence to sustain the verdict. The evidence was conflicting, but it is not claimed by the appellants' counsel that there was no evidence adduced upon the trial in support of the verdict. All that is claimed by counsel is, that the verdict of the jury was not sustained by a fair preponderance of the evidence. The burden of the issues, both as to the alleged unsoundness of mind of the grantor in the deed sought to be set aside, and of the undue influence in the procurement of said deed, was upon the plaintiffs below. All the presumptions were against the plaintiffs, and it was incumbent on them to establish by positive evidence the alleged invalidity of the deed. Under these circumstances, it seems to us, we may well hold that the verdict was sustained by suffi-

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cient legal evidence, and certainly we can not disturb the verdict upon the mere weight of the evidence. *Durrah v. Stillwell*, 59 Ind. 139.

The questions arising under the fourth and fifth causes for a new trial, which relate to the action of the court in refusing to give the jury certain instructions asked by the plaintiffs, and in giving of its own motion certain other instructions, may properly be considered together. In their brief of this cause, the appellants' counsel have wholly failed to point out any objection to any of the instructions given by the court of its own motion, either as to the law enunciated therein, or as to their applicability to the case made by the pleadings and evidence. It is claimed by counsel, however, that the court erred in its refusal to give the jury certain of the instructions asked for by the plaintiffs, because they were more specific than those given by the court of its own motion, and were not fully covered thereby. On the other hand, the appellees' counsel earnestly insist that the record fails to show that any instructions were asked for by the plaintiffs below, or that any such instructions had been made parts thereof, in any of the modes prescribed by law.

It seems to us that the point thus made by the appellees' counsel is well taken, and must be sustained. In the *fourth* clause of section 324 of the code it is provided that "When the evidence is concluded, and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court." 2 R. S. 1876, p. 166. In section 325 of the code it is provided that "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'refused and excepted to,' or 'given and excepted to,' which shall be signed by the party or his attorney."

The plaintiffs below did not make, nor attempt to make, the instructions asked by them and refused by the court a

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part of the record of this cause by filing "a formal bill of exceptions." In the transcript, however, the clerk of the court below has stated "that during the trial of the foregoing entitled cause the plaintiffs asked the court to instruct the jury as follows, to wit: which said instructions were, at the time they were asked and refused, filed with the instructions given by the court, and were filed May 23d, 1873." This statement of the clerk is followed by the title of this cause, and by copies of certain writings which we may assume to be the instructions referred to by the clerk as having been asked for by the plaintiffs and refused. Each one of these copies is followed by the phrase mentioned in said section 325 of the code above quoted, "*refused and excepted to*," signed by the plaintiffs' attorneys. But the record wholly fails to show that the instructions under consideration were signed by the plaintiffs or by their attorneys, at the time they were asked for "and delivered to the court." Under the provisions of the code, as construed in and by the decisions of this court, it may be regarded as settled, we think, that when special instructions to the jury are asked for, they must be "signed by the party or his attorney asking the same, and delivered to the court;" and that, if not thus signed, the party asking such instructions can not be heard to complain of the court's refusal to give them. Busk. Prac. 105; *Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325; *Etter v. Armstrong*, 46 Ind. 197; *Stott v. Smith*, 70 Ind. 298; *Wallace v. Goff*, 71 Ind. 292.

For aught that appears in the record to the contrary, it may well have been that the court refused to give the jury the instructions asked for by the plaintiffs, because they were not signed by them or their attorneys at the time of their delivery to the court. But, be this as it may, it is certain, we think, that the instructions asked for were not made parts of the record in any of the modes prescribed by law, and that, for this reason, no question is presented thereby for the decision of this court.

The sixth, seventh, eighth and ninth causes for a new trial

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assigned by the plaintiffs below in their motion therefor, were and are too vague, uncertain and imperfect to present any question for the decision either of the trial court or of this court. In each of these causes for a new trial reference was made to matters alleged to be shown by certain bills of exceptions, which were said to be parts of the record of this cause. It is apparent, however, from the transcript before us, that the bills of exceptions, thus referred to in these causes for a new trial, were not in existence at the time the motion for such new trial was filed, and were not filed as parts of the record, nor signed by the judge of the court, until nearly two months after the filing of such motion. It is settled by the decisions of this court, that such vague and uncertain causes for a new trial can not be aided nor perfected by reference to bills of exceptions which were not in existence when the causes were filed, but were afterwards filed as parts of the record. *Worthington v. Brown*, 48 Ind. 152; *Cobble v. Tomlinson*, 50 Ind. 550; *Sutherland v. Hankins*, 56 Ind. 343.

The tenth cause for a new trial was newly-discovered evidence. This is one of the causes which, under the code, "must be sustained by affidavit showing their truth." The tenth cause for a new trial reads as follows: "Because of newly-discovered evidence, material for the plaintiff, which he could not, with reasonable diligence, have discovered and produced at the trial, and which he has discovered since the rendition of the verdict herein, and which more fully appears by affidavits filed herein in support of this cause."

It will be observed that the names of the persons whose affidavits were filed were not given in the cause for a new trial, nor was it stated therein that the affidavits were filed therewith. Immediately preceding the entry of judgment, the motion for a new trial, not accompanied by any affidavits, was copied into the record. Nearly two months after the entry of judgment a bill of exceptions was signed and filed, containing again the motion for a new trial, with the date of its filing, followed by the statement that, "in support of the rea-

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sons for a new trial, the plaintiffs introduced in evidence the following affidavits," and then follow two affidavits. The record nowhere shows the date of the filing of these affidavits, nor that they were ever filed. The sufficiency of the tenth cause, therefore, might well be doubted.

But, waiving this point, it seem clear to us that the affidavits in question were not sufficient to sustain the tenth cause for a new trial. They fail to show that the plaintiffs could not, with reasonable diligence, have discovered and produced at the trial the alleged newly-discovered evidence. Indeed, we think the affidavits do show that, by the exercise of ordinary diligence, the evidence in question could have been easily discovered, and, as to its production, the witness who was to give the evidence was present and testified at the trial.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

No. 9225.

THE STATE, EX REL. BENCKERT, v. WYLIE ET AL.

GUARDIAN'S BOND.—*Set-Off.—Pleading.—Principal and Surety.—Decedents' Estates.*—In an action upon the bond of a deceased guardian the sureties may plead, by way of set-off, an indebtedness of the estate of the relatrix to the estate of their principal.

DEMURRER.—*Argumentativeness.*—Argumentativeness in a pleading is not cause of demurrer under the code.

PRACTICE.—*Evidence.—Supreme Court.*—Where there was evidence tending to support the finding, such finding can not be disturbed by the Supreme Court on the mere weight of the evidence.

From the Monroe Circuit Court.

J. H. Loudon and R. W. Miers, for appellant.

J. W. Buskirk and H. C. Duncan, for appellees.

BICKNELL, C. C.—This was a suit on a guardian's bond.

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James W. Coffey, guardian of Mary J. Crow, resigned his office, and M. P. Harbison was appointed his successor. Harbison gave a bond with William Wylie and Isaac M. Rogers as sureties. Harbison died leaving the guardianship unsettled, and Wylie and Rogers, his sureties, were appointed his administrators. B. F. Adams succeeded Harbison as guardian, and this suit was commenced, on his relation, on the bond of Harbison against his administrators and sureties. Pending the suit the ward married Henry Benckert, and became the plaintiff's relatrix by substitution. The complaint stated, in substance, that Harbison had received and failed to pay over the ward's money, and judgment was demanded for \$2,000. The defendants answered in six paragraphs. To each of the second, third and fourth of these paragraphs the plaintiff demurred, for want of facts sufficient, etc. Said demurrers were overruled. The plaintiff filed a reply in three paragraphs, and the issues were tried by the court, who found for the plaintiff \$297. The plaintiff's motion for a new trial was overruled, and judgment was rendered on the finding. The plaintiff appealed. The errors assigned are:

1st. Overruling the demurrers to the second, third and fourth paragraphs of the answer.

2d. Overruling the motion for a new trial.

The second paragraph of the answer alleged, as a set-off, indebtedness of the estate of the relatrix to the estate of the principal in the bond. There was no error in overruling the demurrer to this paragraph. Civil code, sec. 58; R. S. 1881, sec. 349; *Myers v. State, ex rel.*, 45 Ind. 160. The third and fourth paragraphs of the answer are argumentative denials of the complaint. Argumentativeness is not a cause of demurrer under the code. *Judah v. Trustees of Vincennes University*, 23 Ind. 272; *Loeb v. Weis*, 64 Ind. 285; *Stoddard v. Johnson*, 75 Ind. 20. There was no error in overruling the demurrers to these paragraphs of the answer. The reasons assigned for a new trial were:

1st. That the finding is contrary to law.

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2d. That the finding is contrary to the evidence.

3. That the finding is not sustained by sufficient evidence.

4th. That the amount of the recovery is too small.

There was evidence tending to support the finding, and this court has often held that such a finding can not be disturbed on the mere weight of the evidence. *Hayden v. Cretcher*, 75 Ind. 108; *Talbott v. Kennedy*, 76 Ind. 282. There was no error in overruling the motion for a new trial, and the judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

Opinion filed at the May Term, 1882.

Petition for a rehearing overruled at the November Term, 1882.

No. 10,146.

BOND v. HEUSER.

SHERIFF'S SALE.—*Description.*—*Return on Execution.*—A description, "twenty-eight feet off of the west side of lot number five, in block L, in the city of Seymour, Jackson county, Indiana," is sufficient, in the return on an execution.

SAME.—An imperfect description of one tract of land in a sheriff's return on an execution of the sale of real estate does not invalidate the sale as to another separate and distinct parcel fully described in such return.

From the Jackson Circuit Court.

R. Applewhite, for appellant.

J. B. Brown and *W. K. Marshall*, for appellee.

ELLIOTT, J.—The question in this case is whether the ruling of the court excluding returns made by a sheriff upon executions issued upon two judgments rendered against Christopher Klipple, the grantor of the appellee, was or was not correct.

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The objection stated to these returns, and which prevailed in the court below, was, as the record recites, "that the description therein contained is uncertain, indefinite and insufficient." There are two parcels of land described, but only one of them is claimed by the appellant, and the description given of it in his complaint is as follows: "A strip of ground twenty-eight feet in width off of the west side of lot number five, in Block L, in the city of Seymour, in the county of Jackson." In the returns this parcel is described as follows: "Twenty-eight feet off of the west side of lot number five, in Block L, in the city of Seymour, Jackson county, Indiana." The two descriptions are the same, and, in our opinion, are both sufficient. Mr. Freeman and Mr. Herman cite many cases in which descriptions much less certain than that under examination were held sufficient. Freeman Ex., section 281; Herman Ex. 381.

The objection stated to the trial court raised no other question than that of the sufficiency of the description of the property in controversy, and can not be deemed to raise the question whether it was essential that the description of the other parcel should have been shown to be sufficient. If, however, the objection had presented that question, we think it would have been unavailing. The appellant was not bound to show title to any other than the parcel claimed by him, and if he succeeded in doing this he was entitled to a recovery. We do not understand that an imperfection in the description of one parcel of land invalidates the sale as to another separate and distinct parcel, which is fully described.

We have no brief from the appellee, and can not conceive any ground upon which the ruling of the trial court can be sustained. Judgment reversed.

Williams v. The State, *ex rel.* Gudgel, etc.

Nos. 10,058, 10,059, 10,060.

WILLIAMS v. THE STATE, EX REL. GUDGEL, ETC.

CRIMINAL LAW.—*Grand Jury.—Legality of.—Act of 1881.*—A grand jury empanelled and in existence at the taking effect of the act of April 15th, 1881, Acts 1881, p. 557 (R. S. 1881, sec. 1385 *et seq.*), was not discontinued by force of that act.

SAME.—*Action Upon Recognizance Bond.*—Prior to the act of April 15th, 1881, an action upon a recognizance could not be brought before the close of the term at which the forfeiture was declared; but the appointment of an adjourned term to be held after the ensuing regular term in another county of the same circuit did not prevent the bringing of such action.

SAME.—*Statute Construed.—Empanelling Grand Jury.*—The act of April 15th, 1881, does not repeal section 12 of the prior law concerning the selection and empanelling of grand juries.

STATUTES.—*Repeal of.—Purview of Act.*—The purview of an act begins with its enacting clause and ends before the repealing clause; and an act repealing acts and parts of acts within its purview repeals all acts in relation to cases provided for by the repealing act, but not acts or parts of acts in relation to cases not so provided for.

From the Posey Circuit Court.

A. P. Hovey, W. P. Edson, E. M. Spencer and M. W. Pearse, for appellant.

W. H. Gudgel, Prosecuting Attorney, for appellee.

WOODS, C. J.—These cases are alike. The action in each was upon a forfeited recognizance. Each complaint charges that on the 16th day of April, 1881, being the 12th day of the April term of the Posey Circuit Court, the grand jury of that court returned an indictment for grand larceny against John T. Williams, who was then and there arrested upon said charge, and did then and there in open court enter into a recognizance in the sum of \$1,000, with the appellant, Asa C. Williams, as his surety, conditioned for his appearance to answer the charge on the first day of the next term of the court, etc.; that on the third day of the next term, to wit, on the 31st day of August, 1881, the said John T. Williams having failed to appear, and the appellant failing to produce his body in court, the recognizance was declared forfeited.

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To this complaint the appellant in each case filed a verified plea in abatement, wherein it is alleged "that the recognizance set forth in plaintiff's complaint was forfeited on the 3d day of September of the August term of this court; that this court was afterwards adjourned from the — day of September, 1881, to the 7th day of November, 1881, all being within the August term of this court; that said plaintiff commenced this suit during the August term of this court, to wit, on the 24th day of September, 1881, being the same term at which said forfeiture was made." The court sustained a demurrer to each of these pleas. The appellant excepted to the ruling, and then filed in each case an answer in two paragraphs, both to the effect that the grand jury which returned the indictment was empanelled on the 5th day of April, 1881, and on the 15th of that month ceased to have a lawful existence, by force of the statute concerning juries, which was approved and took effect on that day (Acts 1881, p. 557), and that, consequently, the indictments returned by that jury on the 16th day of that month were null and void, and afforded no support for the warrants ordered to be issued thereon, by virtue of which alone the accused was arrested, brought into court and required to give the recognizance sued on. The court overruled demurrers to these answers, and, upon issues joined, found for the State in each case, and gave judgment for the amount of the recognizance. The appellant alleges error in the ruling upon his pleas in abatement, and in the overruling of his motion for a new trial. Concerning the plea in abatement, counsel for the appellant say:

"The recognizance was taken under the statutes of 1852, and was forfeited after the acts of 1881 were in force. Can an action be brought on such a recognizance at the same term of its forfeiture? By the law in force when the recognizance was made, no action could be brought until the next succeeding term. In other words, the recognizers had until the last hour of the last day of the term to appear and save their re-

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cognizance. The recognizance was given April 16th, 1881, for the appearance of the accused at the next term of the court. The next term commenced in August, and continued until November, 1881. Before the expiration of the term, on the 24th day of September, 1881, this suit was commenced."

By the act of January 21st, 1881, Acts 1881, p. 44, fixing the terms of court in the first circuit, it is provided that the courts shall begin in Posey county, on the last Monday in August, the second Monday in November, etc., and continue three weeks, and in Vanderburgh county on the Monday succeeding the courts in the county of Posey, and continue seven weeks. It is evident, therefore, that the term at which the forfeiture was declared had ended, and the term in Vanderburgh county was on, when the suit was commenced, and notwithstanding an adjourned term of the Posey Circuit Court had been appointed for the 7th day of November ensuing, we think, independently of the provision in the law of 1881, R. S. 1881, sec. 1722, the suit was not prematurely brought. There is nothing in *Glass v. State*, 39 Ind. 205, inconsistent with this conclusion.

We do not think that the indictment in question was null and void, and if there was any reason for which it might, upon motion or plea in abatement, have been set aside, the motion or plea should have been made in the ordinary way, and not in this action where the attack upon the record of the empanelling of the grand jury and of the return of the indictment is essentially collateral, and should not be considered with favor, if, indeed, it be deemed at all permissible. There would seem to be no more propriety in admitting such a plea as this than in allowing the action to be defeated on the ground that the indictment might have been quashed for defect in the statement of the offence, or for failure to charge an offence under the law. See *State v. Wenzel*, 77 Ind. 428.

The act of April 15th, 1881, provided a new mode for selecting grand jurors, that is to say, by commissioners to be

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appointed by the court during last term of the year, except that for the year 1881 they were to be appointed "at the first term of the circuit which may be in session after this act takes effect." The repealing clause embraces "All laws within the purview of this act, and inconsistent with it."

It were a strained construction to say that this enactment terminated the existence and powers of grand juries then serving in courts in session at the time when the act took effect; but if it were conceded, as is contended, that a grand jury exists only by statute, and must fall with the repeal of the law under which it was organized, unless there be a saving clause in the repealing act, still there remained the provision of law, 2 R. S. 1876, p. 419, section 12, that "No plea in abatement, or other objection shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amounts to corruption, in which case such plea or objection shall be received." This section of the former law is in no manner inconsistent with the enactment of 1881, and saves the acts of the grand jury in question, done under the sanction of the court, though it should be conceded that from the taking effect of that law the further employment of such jury was irregular.

The purview of an act begins with the enacting clause and ends before the repealing clause. Bouvier Law Dict. In *Payne v. Conner*, 3 Bibb, 180, it is said: "The meaning usually attached to this term by writers on law seems to be the enacting part of a statute in contradistinction to the preamble; and we think the provision of the act repealing all acts or parts of acts coming within its purview, should be understood as repealing all acts in relation to all cases which are provided for by the repealing act; and that the provisions of no act are thereby repealed in relation to cases not provided for by it."

In order to come within the repealing clause of the act of

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April 15th, 1881, the matter must not only be within the purview, but inconsistent with that act. Section 12, *supra*, is neither within the purview of that act nor inconsistent with it, and is still in force.

Judgment affirmed, with costs.

No. 10,595.

THE STATE, EX REL. COGHLEN, v. PORTER, GOVERNOR,
ET AL.

STATE BONDS.—*Internal Improvement Loan.—Compound Interest.—Unreasonable Delay of Payment.—Question of Fact or Law.*—Where it appears that there is a controversy between the State and the holder of its bonds, in regard to the rate of interest such bonds shall bear after maturity, and that the State, under the advice of its Attorney General, has delayed payment until the question in dispute could be determined by the courts, the question as to whether or not the delay of payment for such a purpose was so unreasonable as to entitle the holder of the bonds to compound interest, is a question of fact and not of law.

AGREED CASE.—*Judgment Conclusive.—Estoppel.—Exception.*—Where the State, by its proper officers, enters into an agreed case, if it is not bound by the agreement, it is in any event concluded by a judgment and decision to which it has not excepted.

SAME.—*Correction of Mistake.—Assignment of Error.—Superior Court.*—Where there is a clear and palpable mistake in an agreed case and in the judgment thereon, the court at special term is authorized, upon motion of the aggrieved party, to correct such mistake; and if the opposite party desires to present any question in relation to the ruling on such motion to the court in general term, he must not only except to such ruling, but he must assign the same as error or cross error, in the general term, and, if the assignment is not there made, the question can not be presented in the Supreme Court on appeal from general term.

From the Superior Court of Marion County.

J. R. Wilson, J. L. Wilson, T. A. Hendricks, A. W. Hendricks, C. Baker and O. B. Hord, for appellant.

F. T. Hord, Attorney General, for appellees.

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Howk, J.—This was an agreed case under the provisions of section 553, R. S. 1881. The cause was submitted for trial to the court, at a special term, upon an agreed statement of facts, and the court made finding in part for the appellant's relator and in part for the appellees, and, on April 29th, 1882, rendered judgment accordingly, to which judgment the relator at the time excepted. Afterwards, on November 15th, 1882, the relator moved the court in writing to correct an alleged mistake in the entry of the judgment. On the 21st day of November, 1882, the appellees appeared and answered the relator's written motion, and filed their cross motion to amend the entry of judgment in a specified particular. Upon a hearing had on November 25th, 1882, the court sustained the relator's motion, and made an order correcting the entry of judgment in accordance therewith, to which ruling and order the appellees at the time excepted. Their motion for a new trial having been overruled, they excepted to the ruling and filed their bill of exceptions. Both parties appealed to the court in general term, where the judgment and subsequent order of the court at special term were in all things affirmed, and from this judgment of affirmance this appeal is now here prosecuted.

By proper assignments of error and cross error, the parties brought before this court the errors and cross errors which they respectively assigned in the court below in general term. We will first consider and dispose of the relator's errors, assigned by him below, in general term. These errors were as follows:

1. The court at special term erred in overruling relator's motion for a new trial.

2. The finding and decision of the court were contrary to the evidence.

3. The finding and decision of the court were contrary to the agreed facts and the agreed case.

4. The finding, decision and judgment of the court were contrary to law.

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5. The finding and judgment of the court were not sustained by the agreed facts and by the evidence.

6. The court erred in assessing the amount of recovery, the same being for a sum too small; the same should have been \$121,740.72, with interest thereon from December 3d, 1877.

All the questions presented for decision by these alleged errors depend upon the agreed facts. It is necessary, therefore, to a proper understanding of the questions decided, and of the grounds of our decision, that we should first give a summary, at least, of the agreed facts; and this we will do as briefly as we can.

On the first day of July, 1836, the State of Indiana, by its agents, lawfully authorized thereunto, executed its certain negotiable bonds, twenty-four in number, to J. J. Cohen & Brothers, or bearer, the bonds differing only in the number which they bore, and being numbered as follows: 284, and 260 to 282, inclusive; by which bonds the State promised to pay to J. J. Cohen & Brothers, or bearer, the sum of \$1,000, with interest on each bond from its date to maturity at the rate of five per cent. per annum, at the Merchants' Bank, in the city of New York; each of the bonds maturing twenty-five years from date of same, to wit, on the 1st day of July, 1861; the interest upon each of the bonds being payable in semi-annual instalments, of \$25 each, the semi-annual instalments of interest to maturity being put into coupons, attached to the several bonds, the same numbering fifty to each bond at the date of its execution. Before the maturity of the bonds or any of the coupons, the bonds and coupons were duly sold, assigned and delivered to the relator, Henry Coghlen, who was the owner of the bonds and of forty-one coupons attached to each of the bonds, to wit, 984 coupons; the other nine coupons, attached to each of the bonds, were duly paid at their maturity by the State of Indiana. All the bonds were of the same tenor and effect, and the following is a copy of one of them:

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“UNITED STATES OF AMERICA, STATE OF INDIANA.

“*Internal Improvement Loan.*

“\$1,000. Five per cent. Stock. No. 284.

“Under the Act of the General Assembly of the State of Indiana, entitled ‘An Act to provide for a general system of internal improvement in Indiana,’ approved January 27th, 1836.

“*Know all men by these Presents,* That there is due from the State of Indiana to J. J. Cohen & Brothers, or bearer, the sum of one thousand dollars, bearing an interest of five per centum per annum from the date hereof, the first of which interest is payable the first day of January next, and thereafter semi-annually on the first days of July and January, at the Merchants’ Bank, in the city of New York, on presentation and delivery of the dividend-warrants severally hereto subjoined until payment of the principal sum, which principal sum, being stock created in pursuance of the Act of the General Assembly aforesaid, is payable in twenty-five years from the date hereof. And for the payment of the interest, and the redemption of the principal aforesaid, at the city of New York, the faith of the State of Indiana is irrevocably pledged. Witness our hands, at Indianapolis, this first day of July, 1836.

(Signed)

JER. SULLIVAN,

“SAMUEL HANNA,

“ISAAC COX,

“Commissioners.”

And the following is a copy of a coupon attached to the bond, to wit:

“Indiana Internal Improvement Loan. Under the Act of January 27th, 1836. Merchants’ Bank in the city of New York pay to bearer twenty-five dollars, being half a year’s interest on Bond No. 284, due July 1st, 1841.” Signed, etc.

The remaining forty coupons attached to said bond are of like tenor and effect, except as to the time they fall due, the same falling due semi-annually in January and July of each year to July 1st, 1861, when the last coupon fell due. To

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each of the bonds were attached forty-one coupons of like character and terms as the preceding.

On the 12th day of December, 1872, the General Assembly of the State of Indiana, by an act entitled "An Act to provide for the payment of sundry bonds or stocks of the State of Indiana issued prior to the year 1841, and declaring an emergency," made provision for the payment of one hundred and ninety-one bonds, with the coupons to the same belonging, upon the terms therein set forth; and the bonds and coupons involved in this suit were a part of the number contemplated in the aforesaid act, and for the payment of which the act provided, and the number of the bonds mentioned in the preamble of the act had not all been paid, but twenty-four of the number remained unpaid. At a meeting of the board, composed of the Governor, Attorney General, Treasurer of State and Secretary of State, of the State of Indiana, held at the office of the Governor of the State, on the 3d day of December, 1877, the relator, Henry Coghlen, appeared and presented to the board the bond No. 284, and the forty-one coupons thereto attached, and then and there demanded payment of the bond and coupons, with interest on the bond and its coupons, from the maturity of the bond, and from the maturity of the coupons respectively, to December 3d, 1877, at the rate of seven per cent. per annum, the sum then and there demanded, so computed, being \$5,072.50. The board then and there declined to pay the sum so demanded, but announced its willingness to pay the bond and coupons, with interest thereon after the maturity thereof respectively, up to the 13th day of February, 1873, at the rate of six per cent. per annum, and at no greater rate and for no longer time, alleging as a reason for their course that a preceding board had, on the day and year last named, adopted the following resolution, to wit: "That, as the State has announced its readiness to pay the bonds, by making public the law for that purpose, that interest be allowed up to February 13th, 1873, and not thereafter." The announcement referred to in this resolution consisted

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only in the enactment of the law, and its publication, as other laws are published.

It was further agreed that the amount so demanded by the relator was correct, being computed on the basis aforesaid, as to amount and mode of computation. At the time of such demand as aforesaid the board had full knowledge that the relator was the owner and holder of twenty-three other bonds and forty-one coupons to each bond belonging, of like terms, character, tenor and effect, and the relator was still the owner and holder of the said other twenty-three bonds. It was further agreed that the principal and interest upon the twenty-four bonds and their coupons amounted to the sum of \$121,740.72 upon the day of the demand, made as aforesaid upon the said board. At the date of the execution of the bonds and coupons, and from that date up to the — day of ———, 187—, under a public law of the State of New York, where the bonds and coupons were payable, in that behalf enacted, the customary or legal rate of interest on such contracts, after maturity, and in the absence of a stipulation to the contrary, was at the rate of seven per cent. per annum. This law was changed in 187—, and the rate reduced to six per cent. per annum. On the first day of August, 1881, the board aforesaid, acting for and on behalf of the State of Indiana, tendered to the relator the principal sum of the twenty-four bonds and of the coupons, with interest thereon after maturity at the rate of seven per cent. per annum, the amount so tendered being \$128,560.34; but the relator refused to accept the amount so tendered, although the tender was in all respects legal to the extent of the amount tendered, and demanded payment on the bonds and coupons of the sum of \$121,740.72, with interest thereon at the rate of seven per cent. per annum, from the 3d day of December, 1877, to the first day of August, 1881, the day of the tender as aforesaid, the amount of such demand then being \$152,940.12; which sum so demanded the board refused to pay, and then and there announced that it would pay no greater or different sum than that tendered as aforesaid.

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Either party may appeal from the decision of the court to the Supreme Court ; and the production in court of the amount of the tender, of August 1st, 1881, was waived.

It was also agreed that the court might pass upon and finally determine the following questions :

“Is the relator entitled to interest from the third day of December, 1877, to the first day of August, 1881, on the aggregate sum of the twenty-four bonds, including the coupons and interest on the bonds and coupons ?

“If the relator is entitled to interest on such aggregate sum as aforesaid, does the Indiana or the New York rate prevail ?

“If the law be with the plaintiff upon the facts as aforesaid, judgment shall be for the plaintiff, that the bonds above described shall be surrendered up to the aforesaid board, and a mandamus issue commanding said defendants to pay \$152,940.12, and interest on \$121,740.72 from August 1st, 1881, to the time of the decision of this case ; and if the law be with the defendants, judgment shall be, that the bonds above described shall be surrendered up, upon payment of said sum of \$128,560.34 ; and to the end that this controversy may be made final and conclusive, the said bonds are now brought into court, and deposited with the clerk thereof.”

This agreed statement of facts was signed by the attorneys of the parties ; and it appeared, from an affidavit thereto attached, that the controversy was real and the proceedings in good faith to determine the rights of the parties.

It will be seen from the agreed statement of facts that, at the commencement of this suit, the only questions in dispute between the parties were these :

1. Was the relator entitled to compound interest on the interest which had accumulated on his bonds and coupons up to December 3d, 1877, from that date up to the time of the decision of this cause ? And,

2. If he was entitled to such compound interest, should it be computed at the rate prescribed by the statute of this State, or by the statute of New York ?

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So far as the first question is concerned, it is claimed by the relator that he was and is entitled to such compound interest, and he bases his claim solely upon the ground that, from and after the third day of December, 1877, the interest then accumulated, due and unpaid on his bonds and coupons from the times of their respective maturity, has been "withheld by unreasonable delay of payment." It is conceded by relator's counsel, as we understand them, that the question as to whether or not there has been an unreasonable delay of payment is a question of fact and not of law. Counsel say: "The position of the appellant is that he is entitled to interest, or damages, on such sum from December 3d, 1877, because, from that time on, the withholding of payment was unreasonable. As to whether the withholding of payment was unreasonable, is a question of fact. The agreed facts herein speak for themselves on that subject."

The court below, at special term, was the trier of the facts, and it found for the relator in the sum agreed upon, excluding all compound interest, and, in effect, denying his claim therefor, and ordered the appellees to pay to the relator, upon his surrender of his bonds and coupons, the sum so found due him. Then followed this finding and judgment: "As to all the other facts set forth in the agreed case, the finding and judgment of the court be and are for the defendants." This finding and judgment were in effect a denial of the relator's right to compound interest, whether for unreasonable delay of payment or for any other cause. The court in general term affirmed this finding and judgment, and we think there was no error in this judgment of affirmance, of which the relator can complain. It is said the agreed facts show that the delay of payment was unreasonable. It is shown by the agreed case, that the parties could not agree upon the question as to what rate of interest the bonds and coupons bore after their maturity; and it may be assumed, we think, that the board, under the advice of the highest law officer of the State, withheld payment of the amount demanded until the question in

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dispute could be determined by the courts. Such delay of payment, for such purpose, does not seem to us to be an "unreasonable delay of payment" within the meaning of the statute.

We are of the opinion, therefore, that the relator was not entitled to compound interest for any cause, and this conclusion renders the second question above stated immaterial, and it need not be considered or decided.

By their cross error the appellees have brought before this court only such cross errors as were properly assigned by them in the court below in general term. The only cross errors assigned by them in general term were matters which might have constituted proper causes for a new trial in their motion therefor, if the case had been one in which such motion was necessary; but, as assignments of error, these matters presented no question for decision, either by the general term or by this court. *Bartholomew v. Preston*, 46 Ind. 286. But the case is one in which a motion for a new trial was not required; and, if it had been necessary, the appellees did not assign the overruling of their motion for a new trial as a cross error in the general term. It is clear, therefore, that, in any view of this case, the appellees have not properly saved and reserved in the record any questions for the decision of this court.

The judgment of the court, in general term, is affirmed, at the costs of the relator.

ON PETITION FOR A REHEARING.

Howk, J.—Appellees' learned counsel asks a rehearing of this cause upon the ground, as we understand him, that we mistook the record in holding, as we did, that "the appellees have not properly saved and reserved in the record any questions for the decision of this court." Did we mistake the record?

In the general term of the court below the appellees assigned the following cross errors:

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“ 1. The finding of the court was and is contrary to law ;

“ 2. The finding of the court is not sustained by the evidence, and is contrary to the evidence ;

“ 3. The court had no authority to change the agreement, or to render judgment for more than that agreed to, in the agreed statement and case ;

“ 4. The finding of the court is excessive, and the amount for which the correction was made was and is excessive, and is contrary to law and the evidence ; and,

“ 5. The court allowed more interest than that to which relator was entitled, and at a greater rate of interest than authorized by law.”

Each one of these cross errors stated matter which would have constituted a proper cause for a new trial, if the case had been one in which a motion for a new trial had been requisite or necessary. The appellant's relator, in an agreed case, obtained a judgment of the court at special term for a peremptory mandate against the appellees, in their official capacities. The only “ matter of controversy ” between the parties in such agreed case was decided by the court in favor of the appellees, and, of course, they did not except at the time to the court's decision. As to the rate of interest allowed by the court, it seems to us that the appellees, if not bound by their agreement, are in any event concluded by the judgment and decision of court, to which they saved no exception.

But there was a mistake in the agreed case, and in the record thereof and of the judgment thereon ; and the relator filed a written motion to correct such mistake. It was a mistake in figures or amounts, apparent on the face of the record, and was so clear and palpable that it could not be controverted. It was not a motion for a *nunc pro tunc* order or entry ; for the entry had been made at the proper time. But it was, as we have said, a motion to correct an apparent mistake in the record of the judgment. The court was fully authorized, we think, to correct such a mistake, if it existed, upon the motion or petition of either party. *Jenkins v. Long*, 23 Ind. 460 ;

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Miller v. Royce, 60 Ind. 189; *Reily v. Burton*, 71 Ind. 118; *Mitchell v. Lincoln*, 78 Ind. 531.

When the court at special term sustained the relator's motion to correct the mistake in the record of this cause, the appellees at the time excepted. On the appeal to the court in general term, if the appellees desired to present any question in relation to the decision at special term, in sustaining the relator's motion, it seems to us that they should have there assigned, as a cross error, that the court at special term had erred in sustaining the relator's motion to correct the alleged mistake in the record of the judgment. This was the only proper assignment of cross error to call in question the ruling of the court on the motion, either in the general term or in this court; and this cross error, as we have shown, the appellees did not assign in the general term, either in form or substance. We are of the opinion, therefore, that the appellees' assignment of cross errors, in the general term below, did not properly present any question for our decision.

Besides, the substantial merits of the controversy in this case (except as to the relator's claim for compound interest, which we have decided against him) were settled adversely to the appellees, in the case of *Gray, Governor, v. State, ex rel. Coghlen*, 72 Ind. 567. Upon all the questions decided therein the case cited must be considered as, at least, the law of this case.

The petition for a rehearing is overruled, at the appellees' costs.

No. 9466.

THE CITY OF EVANSVILLE v. WILTER.

CITY.—*Officers.—Street.—Negligence.—Obstruction.—Notice.—Presumption.—*
City officers must exercise reasonably active vigilance to keep streets in a safe condition, and where a dangerous obstruction has existed for months notice of it will be presumed.

86	414
134	697
86	414
137	91

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SAME.—Excessive Damages.—One thousand dollars, in a suit against a city to recover for a personal injury received in consequence of an obstruction upon a sidewalk, are not excessive damages where such injury confined the plaintiff to his room for sixteen weeks, required him to use crutches three months more, caused him great pain for a longer period, rendered entire recovery doubtful, and entailed considerable expense for medical aid and nursing.

SAME.—Complaint.—Diligence.—Arrest of Judgment.—Notice.—A complaint in such action, which describes the street, the obstruction and the injury, and states facts which show that the city, if diligent in the discharge of its duty, would have had notice of the obstruction, is good on motion in arrest of judgment.

SAME.—Argument of Counsel.—Misconduct.—Instruction.—Harmless Error.—Upon the trial, in such action, it is error to permit counsel for the plaintiff, over objection, in argument to the court, in the presence of the jury, upon the question of the measure of damages, to read extracts from reported cases, showing large damages held not excessive; but such error is cured by a direction of the court to the jury to the effect that the case before them must be determined upon the evidence, uninfluenced by the damages given in other cases.

INSTRUCTIONS.—Practice.—There is no error in refusing to give a correct instruction which is fairly embraced in instructions which have been given.

From the Vanderburgh Circuit Court.

C. Denby and D. B. Kumler, for appellant.

W. M. Blakey and P. W. Frey, for appellee.

MORRIS, C.—The appellee sued the appellant to recover damages for an injury sustained by falling over and upon a large stone while walking along one of the sidewalks of the appellant.

The complaint states that the appellant is a municipal corporation, and that it is its duty to keep its streets and sidewalks in a reasonably safe condition, etc.; that Fourth street, in said city, is one of its principal streets and thoroughfares; that on the night of the 26th of September, 1880, there was, and had been for a long time previous thereto, a large stone lying on the sidewalk, near the center thereof, on said Fourth street; that the appellant had negligently, wrongfully and unlawfully allowed and permitted said stone to so lie upon said

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sidewalk, both in the day and night time, for several months, to the great danger of persons travelling along said sidewalk; that on said night, it being very dark, the appellee was walking along said sidewalk, at said place, and being wholly unaware of said stone being on said sidewalk, and there being no light to warn him of said stone, and not seeing and not being able to see the same because of the darkness, he accidentally, without fault on his part, struck said stone so lying upon said sidewalk, with his feet and legs, and violently fell upon the same, and thereby received serious injury, which is particularly described.

The appellant answered the complaint by a general denial. The cause was submitted to a jury, who returned a verdict for the appellee. The appellant moved the court for a new trial, which motion was overruled. The appellant then moved in arrest of judgment. This motion was also overruled, and final judgment rendered for the appellee.

The rulings of the court upon the motions for a new trial and in arrest of judgment are assigned as errors.

The following statement is contained in the bill of exceptions:

“During the opening argument on behalf of the plaintiff by the attorney for the plaintiff, the counsel of the plaintiff called the attention of the court, and read to the court in the presence of the jury, the following cases reported in the Southern Law Review, where, in a collision, a passenger had his leg broken and received some flesh wounds upon his head, in consequence of which he was confined to his house about five months, and obliged to go on crutches for three or four months afterwards, with one leg left somewhat shorter than the other, but that at the time of the trial his usual health was restored; a verdict of \$6,000 was held excessive and reduced to \$4,000. Also, where a passenger’s arm was broken, the verdict of the jury was so excessive that the court reduced it to \$2,000.

“That said extracts were read by said counsel connected with the law of compensatory damages, and in the conclusion of

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said counsel's argument, and the defendant, by its counsel, at the time objected to said counsel reading said verdicts to the court in the hearing of the jury, because such verdicts gave the jury improper information. Whereupon the court stated to and charged the jury, that the fact that juries found large verdicts in other cases should have no influence with the jury trying this case in making up their verdict, and that each case must be tried upon the facts presented in the evidence; but the court overruled the objection of defendant, and permitted counsel for plaintiff to read the verdict with other parts of the case above set out, to which ruling of the court the defendant excepted."

The reading of the matter thus set out in the bill of exceptions is one of the grounds upon which a new trial is asked. We understand, from the record, that during, or at the close of, the opening argument of counsel for the appellee, in discussing the question of compensatory damages to the court, the matter above recited was read to the court in the presence of the jury, over the objection of the appellant. It is clearly inferable from the bill of exceptions, that it does not contain all that was read by the appellee's counsel to the court, from the cases referred to. It is difficult, if not impossible, to see how or in what way the reading of the above extracts could enlighten the court upon the principles involved in the discussion of the question of compensatory damages. It is almost impossible to resist the conclusion that the extracts from the cases which counsel read to the court were not read with a view to enable the court rightly to decide upon the law as to compensatory damages. On the contrary, we should conclude, but for the action of the court, that the purpose was to reach and influence the jury. The court seems to have regarded the information derived from the matter read by counsel for the appellee, and objected to by the appellant, as germane to the question of law then before it, and, therefore, for its information alone, permitted the counsel to

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proceed, at the same time instructing the jury that the matter read should not influence their verdict.

We think the instruction given by the court to the jury must be held to have rendered the reading of the objectionable matter harmless. The extracts were not read to the jury, but to the court. The court told the jury that what had been read should not influence their verdict—that each case must be decided upon its own merits and upon the evidence in the case. Competent triers could not fail to understand the instructions of the court.

It has been often held that where the court instructs the jury that they should not consider testimony improperly admitted, the verdict will not be disturbed because of the admission of such improper evidence. So here, if the matter read by counsel to the court, in the hearing of the jury, was calculated improperly to influence them, the instruction given them by the court must be held to have freed the jury from such influence.

Arguments upon questions of law arising during the progress of a trial, not always relevant, are constantly addressed to the court in the presence of the jury. This is not objectionable, for the reason that the jurors are supposed to be sufficiently intelligent to know that such arguments are addressed, not to them, but to the court, upon questions to be decided by the court, and not by them; and that they will not, therefore, be improperly influenced by such arguments. Here the extracts were read in argument to the court, not as a part of the argument to the jury. This fact and the instruction given to the jury by the court distinguish this from the case of *St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566, and cases there cited.

The practice of reading from law-books irrelevant statements and verdicts, in arguments addressed to the court in the presence of the jury, is not to be commended; indeed, it can not be too severely condemned; but, in view of the instructions given by the court to the jury in this case, and the fact

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that we can not discover that the matter read had any influence upon the jury, the error of the court must be regarded as harmless. The case of *Porter v. Choen*, 60 Ind. 338, is unlike the case now before us. In the former case, the extracts were not read upon any question of law then before the court; nor were the jury instructed, as in this case, that they were not to regard what was read. We approve the case referred to, but think it not in point in this case.

The appellant also insists that the court erred in refusing to give instructions asked by it, and such refusal is also one of the causes upon which a new trial was asked.

Counsel say: "There is no question but that every word of that instruction is the law. The court did give other instructions embodying the idea that actual or implied notice to the city was necessary to be proved before there could be a recovery against it."

We have examined the instructions asked by the appellant and those given by the court, and have come to the conclusion that the instructions given fairly covered those asked by the appellant, and that they contained a fair statement of the law upon the whole case. There was, therefore, no error in refusing to give the instructions asked.

The appellant also insists that the verdict is not sustained by sufficient evidence.

The appellee testified to his injury; to the fact that he was properly walking on the sidewalk in the night time; that he did not and could not see the obstruction; to the size of the stone on the sidewalk, and its distance from the wall on the inner side of the walk—that it was one and a half or two feet from the fence or wall.

Jacob Schlessinger testified to the size of the stone—12 to 14 inches—and that it was from 12 to 14 inches from the fence; also, that he had seen the stone on the sidewalk for months before, sometimes close to the fence, but generally in the same place; that Fourth street is a very public thoroughfare, and much travelled.

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Fred Wöhnseidler testified that he knew the premises where the appellee was, on sidewalk, on Fourth street, in front of Caden's stone yard; that there was always a rock in front of the stone yard to hold the gate open; noticed stone there as a prop for the gate for a year, all the time he was in the engine house. Other witnesses testified to the extent of the appellee's injuries.

This testimony certainly tended to support the verdict. It is said that it does not show that the appellant had notice, actual or constructive, of the obstruction which caused the injury. But if the obstruction had been upon the sidewalk for a year, as testified by Frederick Wöhnseidler, or for months, as stated by the witness Jacob Schlessinger, the appellant must be held to have had notice of the fact. Where an obstruction has been in the street or sidewalk of a city for such a length of time as to be generally known to the people of the neighborhood, it is just and reasonable to suppose that the officers of the city, whose duty it is to keep the streets in safe condition, have notice of such obstruction. Such officers should exercise a reasonable degree of active vigilance in regard to the condition of the streets of the city. It is their duty to see to it that the streets are in proper repair and reasonably safe. The discharge of this duty requires on their part the exercise of a reasonable degree of diligence and attention to the condition of the streets. They can not, it is true, be reasonably supposed to know of the existence of an obstruction as soon as it is created, but, if reasonably vigilant, an obstruction can not exist for months in a public street without their knowledge. *Dillon Mun. Corp.*, section 790; *Higert v. City of Greencastle*, 43 Ind. 574; *City of Indianapolis v. Scott*, 72 Ind. 196; *City of Logansport v. Justice*, 74 Ind. 378, 385 (39 Am. R. 79); *Todd v. City of Troy*, 61 N. Y. 506, and cases cited.

There was testimony introduced by the appellant tending to show that it had not actual notice of the obstruction, and that the circumstances were such as not to impute to it con-

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structive notice. But this court will not weigh the conflicting testimony. We think there was testimony in the case legally tending to support the verdict. We can not, therefore, disturb it, on the ground that there is not sufficient evidence.

It is said that the damages—\$1,000—are excessive. We think they were not. The appellee was confined to his room for sixteen weeks; had to use crutches for some three months longer. He was still, at the time of the trial, suffering from the injury, and medical witnesses testified that it was doubtful whether he would ever entirely recover from the injury to his knee. He suffered great pain, and was put to considerable expense in procuring medical attendance, medicine and nursing. We think the damages, if not moderate, can not be regarded as at all excessive. We can not think, as suggested by the appellant, that the damages were enhanced by the extracts read to the court from law-books by the appellee's counsel.

The appellant complains of the ruling of the court upon its motion in arrest of judgment. The ground of this motion is that the complaint does not contain a cause of action. We think it does. It describes the street, the obstruction, the injury, and facts from which the city must, if diligent in the discharge of its duty, have had notice of the obstruction. There was no error in overruling the motion.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 9623.

SHOEMAKER v. McMONIGLE.

DEED.—*Description.*—*Real Estate.*—“*Part of*” *Not Words of Certainty.*—A description: “The southeast part of the southeast fourth of the northeast quarter of section 36, township 4 south, and range 2 east, containing thirty-two acres,” is insufficient, being indefinite and uncertain.

From the Harrison Circuit Court.

86	421
145	44
147	211
147	680
86	421
168	572

Shoemaker v. McMonigle.

S. J. Wright, W. T. Zenor and N. R. Peckinpaugh, for appellant.

B. P. Douglass and S. M. Stockslager, for appellee.

FRANKLIN, C.—Appellant sued appellee for the possession of a certain tract of land. The complaint is in two paragraphs. The first is in the usual form, containing a defective description of the land. The second is in the same form, containing a sufficient description of the land by metes and bounds. The defendant answered by a general denial. There was a trial by jury, and, under an instruction by the court to return a verdict for the defendant, a verdict was returned accordingly; and, over a motion for a new trial, judgment was rendered for the defendant for costs.

The error assigned in this court is the overruling of the motion for a new trial. A number of reasons are stated in the motion, which are based upon the refusal to admit certain evidence. The plaintiff's claim of title was based upon a deed from the auditor of the county for the forfeiture, by the non-payment of the principal and interest, of a mortgage executed by the defendant to the State of Indiana upon said land, to secure a loan from the school fund. The lands claimed are described in plaintiff's deed and the mortgage to the State as follows: "The southeast part of the southeast fourth of the northeast quarter of section 36, township 4 south, and range 2 east, containing thirty-two acres."

The court below held this to be an insufficient description of the land, and that no title was thereby conveyed to the plaintiff; and the court refused to admit in evidence the deed, mortgage record, and other papers therewith connected, on account of the defective description of the land, and these are the alleged errors complained of. The question is, does the description, the southeast part, containing thirty-two acres, of a certain forty-acre tract of land, sufficiently designate the land intended to be conveyed? or, from this description,

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could a surveyor find and fix the boundary line between that part of the forty acres so described and the remainder thereof?

In the case of *Major v. Brush*, 7 Ind. 232, it was held that a tax deed for "seventy-six acres of land, being a part of the southeast quarter of," etc., contained a sufficient description of the land, for the reason that the statute in force at the time of the sale provided that, when less than the whole of a tract is sold for taxes, the quantity sold shall be laid off in a square form, in the northwest corner of the tract. Had there been no such statute in force, this description would have been clearly bad. *White v. Hyatt*, 40 Ind. 385.

In the case of *Buchanan v. Whitham*, 36 Ind. 257, where an action was brought to recover a part of ten acres of land off of the east side of the southeast quarter, etc., it was held that the plaintiff should not be permitted to introduce in evidence, to show his paper title, a deed conveying "ten acres off of the southeast side" of the quarter section described. See, also, the case of *Langohr v. Smith*, 81 Ind. 495. The deed and mortgage in controversy describe the land as "the southeast part of," etc., containing thirty-two acres. This description does not fix the boundaries or shape of the land intended to be conveyed. From it a surveyor could not determine whether its form should be in a square, parallelogram, or some other irregular shape. No effort appears to have been made for subrogation, reformation of the mortgage, and foreclosure as reformed.

We think the description of the land as contained in the deed and mortgage is too indefinite and uncertain to allow them to be given in evidence to support the plaintiff's title in an action for the possession of the land. The other questions are all dependent upon the foregoing, and it is unnecessary to further consider them. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Yeagley v. Webb.

No. 9930.

YEAGLEY v. WEBB.

AFFIDAVIT.—Attorney and Client.—Notary Public.—Verified Answer.—Motion to Strike Out.—There is no law in force in this State which forbids an attorney, who is also a notary public, to administer an oath to his client; and, therefore, there is no error in overruling a motion to strike out a verified answer, upon the ground that the affidavit was sworn to by the defendant before his attorney as a notary public.

PROMISSORY NOTE.—Payable in Bank in this State.—Negligence.—Bona Fide Endorsee before Maturity.—The maker of a promissory note, payable to order or bearer in a bank in this State and negotiable as an inland bill of exchange, is liable to a *bona fide* endorsee thereof for value before maturity, if such maker was guilty of negligence in failing to use reasonable care to inform himself of the contents of such note.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

M. W. Bruner, for appellee.

Howk, J.—This was a suit by the appellant, as the endorsee, against the appellee, as the maker, of a promissory note payable at a bank in this State. Issues were joined and tried by a jury, and a general verdict was returned for the appellee, the defendant below. With their general verdict the jury also returned their special findings on particular questions of fact submitted to them by the appellant, under the direction of the court. Over the appellant's motions for judgment in his favor on the special findings of the jury, and for a new trial, the court rendered judgment on the general verdict for the appellee.

The first error assigned by the appellant is the decision of the court in overruling his motion to strike out the first paragraph of appellee's answer. This motion was in writing, and the causes assigned therein, for striking out the paragraph, were as follows:

"1. Because the paragraph is a denial of the execution of the note, and is not sworn to.

"2. Because the paragraph appears to have been sworn to

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by the defendant before her attorney of record, and not otherwise."

The court committed no error, we think, in overruling this motion. We know of no law in force in this State which forbids an attorney, who is also a notary public, from administering an oath to his client. The propriety of such an act may possibly be questioned, but the act is not illegal. The oath thus administered is a legal oath, and, if untrue, the affiant might, doubtless, be convicted of perjury therefor.

The next error complained of in argument, by appellant's counsel, is the overruling of his motion to strike out the fourth paragraph of appellee's answer, for the same reasons assigned in the motion to strike out the first paragraph of answer. There was no error in this ruling of the court.

Appellant's counsel next discusses the alleged error of the court in overruling a demurrer to the fourth paragraph of answer. In this paragraph the appellee alleged in substance that, at the date of the note in suit, two men came to her house near New Ross, Indiana, and contracted with her to put a lightning-rod on her dwelling-house; that the men represented to her that they were the agents of Thomas J. West & Co., of Chicago, Illinois, the payees of said note; that they agreed to put up said rod for the sum of \$9, payable in three annual instalments, and she agreed with them to execute her note for said sum of \$9, payable as aforesaid; that, after such rod had been put up by such men, one of the men drew up a note for her to sign, representing that it was for \$9, in accordance with said agreement; that one of the men pretended to read over to her such note before she signed it; that he read it as a note for \$9, and not for \$65.25; that she understood that it was a note for \$9, and no more; and she averred that she was unable to read writing, and she relied wholly on the representations of said men to state the contents of the note correctly; that there was no one at her house that could read writing except said men, and her nearest neighbors were one-fourth of a mile distant, and she did

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not have time to go and get them to read the note to her; that she believed the note in suit was the one she subscribed her name to, thinking that it was for \$9; that she never intended to execute such a note as she now found her name subscribed to; and she averred that all the representations of such men, as to the amount and contents of the note, were false and fraudulent and made for the purpose of defrauding and deceiving her. Wherefore she said that the note in suit was not her note, and she ought not to be compelled to pay the same, etc.

This paragraph of answer was verified. The note in suit purported on its face to have been executed by the appellee, by making her mark.

We are of the opinion that the court erred in overruling the demurrer to this fourth paragraph of answer. It is claimed by appellee's counsel, that the paragraph is substantially the same as that set out in the opinion of the court in *Webb v. Corbin*, 78 Ind. 403, and which was there held to be sufficient. We think, however, that the paragraph under consideration differs from the one set out in the case cited, in several important particulars. In the paragraph referred to, it appeared that the defendant was an old man, sick and weak in body and mind, afflicted with palsy, and living by himself without any family, at his home in the country, two miles from any town, and that he was wholly deceived in relation to the kind of instrument he was fraudulently induced to execute. No similar facts to these are alleged in the paragraph of answer, the substance of which we have given. The appellee did not allege that she was old, or sick, or afflicted, or that she lived alone, without any family. In the absence of averment to the contrary, it might, perhaps, be assumed that she was in the prime of life, of vigorous health, and living with her house full of children. However this may have been, she did allege that her dwelling-house was near New Ross; and she knew that she executed a note for a lightning rod, after it had been put in position on her house. It may be assumed, we

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think, that the two men referred to in appellee's answer were utter strangers to her, from the fact apparent in the fourth paragraph that she did not give a name to either of the men. Yet she relied upon these two strangers to correctly read the note to her, which they asked her to execute, because she did not have time to go or send one-fourth of a mile to her nearest neighbor, and have the note read to her by some one in whom she might have reasonably placed confidence.

We are of the opinion that the facts alleged in the fourth paragraph of appellee's answer, and the inferences which may fairly be drawn therefrom, make the doctrine of *Nebeker v. Cutsinger*, 48 Ind. 436, and of the numerous decisions of this court in line therewith, strictly applicable to the case at bar. The doctrine there enunciated is, that the maker of a promissory note, payable to order or bearer in a bank in this State, and negotiable as an inland bill of exchange, is liable to a *bona fide* endorsee for value before maturity, if such maker was guilty of negligence in failing to use reasonable care to inform himself of the contents of such note. *Cornell v. Nebeker*, 58 Ind. 425; *Maxwell v. Morehart*, 66 Ind. 301; *Ruddell v. Fhalor*, 72 Ind. 533 (37 Am. R. 177); *Ruddell v. Dillman*, 73 Ind. 518; *Williams v. Stoll*, 79 Ind. 80. In *Ruddell v. Fhalor*, *supra*, it was said: "We think the true doctrine is, that the makers of such a note as the one in suit, who, by their carelessness or undue confidence, have enabled another to obtain the money of an innocent person, should answer the loss they have occasioned." We conclude this part of the case in hand, as we began, with the opinion that the demurrer to the fourth paragraph of appellee's answer ought to have been sustained.

This conclusion renders it unnecessary for us to consider at length either of the other alleged errors. The special findings of the jury, when construed together, as they must be, were not so inconsistent with their general verdict as to entitle the appellant to judgment; although it would be difficult, we think, to reconcile some of the facts specially found with

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the general verdict. In view of another trial of the cause, it would hardly be proper for us to comment on the evidence.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the fourth paragraph of answer, and for further proceedings not inconsistent with this opinion.

No. 9953.

CARDWILL, ADMINISTRATOR, v. GILMORE.

BILL OF EXCEPTIONS.—*Time of Filing.*—*Exceptions.*—Where a cause is tried at one term and taken under advisement and decided at a subsequent term, a bill of exceptions signed and filed at the latter term is insufficient to bring into the record an exception to the court's decision at the former term refusing leave to amend the complaint, and rulings excluding evidence, no time being given at such term to prepare and file a bill after the term.

SAME.—In such case, a bill filed on leave and within the time granted at the term when the case is decided brings into the record the evidence, but is not sufficient to save any exception taken at the prior term.

REPLEVIN.—*Surrender of Property.*—*Nominal Damages.*—Where, in an action of replevin, by the admission of the defendant, testifying as a witness, that he had surrendered part of the property sued for after the commencement of the suit, there being no other evidence, there should be a finding that the plaintiff is entitled to its possession and to at least nominal damages for its detention.

From the Floyd Circuit Court.

E. G. Henry and *J. H. Stotsenburg*, for appellant.

A. Dowling, for appellee.

BICKNELL, C. C.—This was an action of replevin by the appellant against the appellee, to recover the possession of personal property belonging to the estate of his decedent, and alleged to be unlawfully detained by the appellee. The complaint demanded the possession of the property, and \$500 damages for its detention. The sheriff's return upon the writ

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of replevin showed that, after the writ came to his hands, the defendant delivered to the plaintiff part of the property described in the complaint. The return further showed that no other property could be found. The defendant answered by a general denial. The issue was tried by the court at February term, 1881.

The cause was taken under advisement, and at the May term, 1881, to wit, on the 4th of June, 1881, the plaintiff tendered his bill of exceptions No. 1, which was signed by the judge. This bill set forth that, at the trial at the preceding term, the plaintiff asked leave to amend his complaint, which the court refused, to which refusal the plaintiff at the time excepted. The bill also set forth several rulings of the court, excluding evidence offered by the plaintiff; but no bill of exceptions was filed at February term, nor was any time given at that term to prepare and file the bill afterwards. Therefore, this bill of exceptions No. 1 presents no question as to the refusal to grant leave to amend the complaint. *Alcorn v. Morgan*, 77 Ind. 184; *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144). And it presents no question as to the rulings upon the evidence offered. *Sohn v. Marion, etc., G. R. Co.*, 73 Ind. 77; *Backus v. Gallentine*, 76 Ind. 367; *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569. At the May term, 1881, the court found for the defendant, overruled the plaintiff's motion for a new trial, and rendered judgment against the plaintiff for costs.

The plaintiff appealed, assigning errors as follows:

1. The court erred in overruling the motion for a new trial.
2. The court erred in refusing permission to appellant to amend his complaint.

When the motion for a new trial was overruled, at the May term, 1881, the plaintiff obtained sixty days time within which to prepare and file a bill of exceptions, and within that time his second bill of exceptions was filed, setting out all the evidence, together with the same matters presented in bill of exceptions No. 1, and other rulings of the court at the trial. For the purpose of bringing the evidence into the record, this

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second bill of exceptions was sufficient. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110. But it was not sufficient to save any exceptions taken at the prior term of court when the trial was had. It follows that the second specification in the assignment of errors, and the eighth reason for a new trial, both of which allege error in the refusal of the court to permit an amendment of the complaint, can not be considered. And the same is true of the fourth, fifth, sixth, seventh, ninth and tenth reasons for a new trial, which allege error of the court in its rulings upon the admission and rejection of evidence.

The only matters embraced in the first specification of the assignment of errors, which are properly presented, are the first three reasons for a new trial, to wit, that the finding was not sustained by sufficient evidence, and was contrary to the evidence, and contrary to law.

It appeared in evidence that part of the property demanded in the complaint was surrendered by the defendant to the plaintiff after the commencement of the suit. As to this property, the defendant stated as a witness, "I surrendered to administrator, Mr. Cardwill, after demand, the \$3,000 McKee mortgage, and four interest notes \$60 each, the Stewart mortgage and note \$600, the Redman note \$635; I turned over everything that belonged to mother's estate after the commencement of this suit." There was no evidence in conflict with this admission. Therefore, as to this property there should have been a finding that the plaintiff was entitled to the possession of it, *Chissom v. Lamcool*, 9 Ind. 530; and he was entitled to nominal damages, at least, for the wrongful detention of it.

The court, therefore, erred in overruling the motion for a new trial. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Hunnell v. The State.

No. 10,467.

HUNNEL v. THE STATE.

CRIMINAL LAW.—*Change of Venue.—Practice.—Murder.*—In the absence of a rule of court upon the subject, an application for a change of venue from the county may be made at any time before the jury is sworn to try the issue, and if the application is in proper form, founded on excitement or prejudice in the county, the statute, R. S. 1881, section 1771, requires, in capital cases, that the venue be changed.

TRIAL.—*Jury.*—A trial by jury can not begin until the jury is sworn, and in a criminal cause does not include the arraignment or any other merely preparatory proceeding taken prior to swearing the jury to try the cause.

From the Vanderburgh Circuit Court.

C. Denby and *D. B. Kumler*, for appellant.

W. H. Gudgel, Prosecuting Attorney, *C. A. DeBruler* and *E. R. Hatfield*, for the State.

NIBLACK, J.—This was a prosecution against the appellant, Thomas Hunnell, upon an indictment for murder in the first degree. The indictment was returned into court on the 1st day of October, 1881. The cause was afterwards set down for trial on the 20th day of December, 1881, which was the 14th judicial day of the December term of that year. On the last named day the appellant appeared in person, and by his attorneys, and on being arraigned, pleaded not guilty to the indictment. It was thereupon announced by the prosecuting attorney, as well as the attorneys for the appellant, that the cause was ready for trial. It being then about 10 o'clock A. M. of the day last above named, the court proceeded to empanel a jury. At noon, when the court took a recess, ten competent jurors had been selected and placed in the jury box. Up to that time the State had peremptorily challenged eight, and the appellant fourteen, persons called as jurors, and the court had set aside somewhere from fifteen to twenty persons as incompetent because they had either formed or expressed an opinion upon the guilt or innocence of the appellant. Upon the reassembling of the court, after

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the noon recess, the appellant filed his affidavit for a change of venue from the county, the body of which was as follows:

“The said defendant, Thomas Hunnell, being duly sworn, says that he believes he can not receive a fair trial in the county of Vanderburgh, owing to excitement and prejudice against him in said county, and prays for a change of venue, and demands to be tried by disinterested triers. And affiant further says that if there be any rule of this court prescribing the time in which affidavits for changes of venue are to be filed he is ignorant of its existence, and he further says that he did not know of the existence of the said excitement and prejudice against him until this day, and that, immediately upon its becoming known to him, he procured this affidavit to be written and filed.”

The application for a change of venue thus made was overruled upon the grounds—

First. That the affidavit showed no diligence.

Second. That, under the uniform rules and practice of the court, it came too late.

Third. That, in view of what had occurred during the progress of the cause, the court was of the opinion that there was no undue excitement or prejudice against the appellant.

The court then proceeded to complete the panel of the jury and with the trial of the cause, the result being a verdict finding the appellant guilty of manslaughter, and fixing his punishment at imprisonment in the State's prison for the term of fifteen years. After denying a motion for a new trial, the court gave judgment upon the verdict.

The first question presented in its proper order is, Did the court below err in overruling the appellant's application for a change of venue?

Section 1769 of the code of 1881, which has reference to proceedings in criminal cases, provides that “The defendant may show to the court, by affidavit, that he believes he can not receive a fair trial, owing to the bias and prejudice of the

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judge against him, or to excitement or prejudice against the defendant in the county, or some part thereof, and demand to be tried by disinterested triers."

Section 1771 further provides, that "When the affidavits are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases of felony punishable by death shall, grant a change of venue to the most convenient county."

The time within which an application for a change of venue shall be made may, in ordinary cases, be prescribed by a regularly adopted rule of court, and the validity of such a rule, so long and so far as it is reasonable in its operation, will be recognized by this court. *Krutz v. Griffith*, 68 Ind. 444; *Redman v. State*, 28 Ind. 205.

But the record before us does not disclose the existence of such a rule in the court below at the time this cause was tried, and it is admitted in argument that, at that time, no rule upon that subject had been adopted by that court.

No objection is made either to the form or substantial sufficiency of the affidavit under the statute. It is only objected that as an application for a change of venue it came too late.

In support of that theory, counsel for the State argue that the appellant, by announcing through his attorneys, that he was ready for trial, and by uniting in the work of empanelling a jury, had lost the power of retraction as to the time and place of the trial, and had, in this way, precluded himself from afterwards setting up a claim that he could not receive a fair trial in the county of Vanderburgh, for the purpose of postponing the trial and obtaining a change of venue; that hence, for all practical purposes, the trial had begun before the application for a change of venue was made.

In some of the States it has been held that the right to apply for a change of venue remains open until the trial begins; and, in the absence of any rule of court to the contrary, we

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think such ought to be recognized as the proper practice in this State. *Price v. State*, 8 Gill, 295; *Edwards v. State*, 25 Ark. 444. In the same connection it has been further held that the trial does not begin until the panel is completed and the jury sworn. *Price v. State*, *supra*; *Weaver v. State*, 83 Ind. 289; *Sanders v. State*, 85 Ind. 318. This court has substantially agreed to that definition of the time at which the trial begins in both civil and criminal cases. *Jenks v. State*, 39 Ind. 1; *Glenn v. Clore*, 42 Ind. 60.

In its general sense the term "trial" means the "investigation of a matter in issue between opposing parties before a tribunal competent to decide upon it;" and, in a criminal cause, the term does not include the arraignment, or any other merely preparatory proceeding which may be taken prior to the time of administering the requisite oath to the jury. *United States v. Curtis*, 4 Mason, 232, 237.

A jury is a body of men summoned and sworn to decide upon the facts in issue at the trial. 1 Abbott's Law Dictionary. Hence, men summoned as jurors must, also, be sworn before they constitute an organized and competent tribunal to which the issues in a cause can be submitted for trial. It necessarily follows that a trial by jury can not begin until the jury is sworn.

It will be observed that, by section 1771 of the code of 1881, *supra*, the court is peremptorily required to change the venue from the county, in causes like this, where the punishment may be death, when a proper application is made demanding such a change. For that reason many of the decisions of this court on the subject of changes of venue, made under previous statutes, allowing courts to exercise a discretion as to changing the venue in criminal cases, have no application to the case before us.

What we have said brings us irresistibly to the conclusion that the court below erred in overruling the appellant's application for a change of venue, and that, for that cause, the judgment will have to be reversed.

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The judgment is reversed, and the cause remanded for further proceedings.

The clerk will give the necessary notice for the return of the prisoner to the jail of Vanderburgh county.

No. 9891.

THOMAS ET AL. v. DALE ET AL.

SPECIAL FINDING.—*Outside of Complaint. - Conclusion of Law.—Secundum Allegata et Probata.*—When the facts specially found by the court are outside of the complaint, and make a case entirely different from the case stated in the complaint, the court's conclusion of law thereon must be a finding for the defendant. The plaintiff must recover upon and according to the allegations of his complaint, or not at all.

From the Fayette Circuit Court.

B. F. Claypool, J. H. Claypool and C. Roehl, for appellants.
W. C. Forrey and R. Conner, for appellees.

HOWK, J.—In this case the appellees, the plaintiffs below, alleged in substance in their complaint, that, on the 5th day of March, 1868, they and the appellants were partners, doing business under the firm name and style of "The Cabinet Makers' Union," of Connersville, Indiana; that at said time the appellants, then partners under the firm name of Lewis R. and Oliver I. Thomas, were doing a separate and independent business in their said firm name; that the appellants, as such partners, became and still were indebted to the appellees for goods, wares and merchandise sold and delivered to appellants by said Cabinet Makers' Union, and for money paid and money had and received by the appellants, for the use and benefit of the Cabinet Makers' Union, in the sum of \$2,319.-28, a bill of particulars of which was therewith filed and made part thereof; that the affairs of the Cabinet Makers' Union had all been paid, except those due to and among the individual members thereof, as stated; that, as members of the

86	435
124	279
86	435
131	299
86	435
138	131
139	414
139	468
86	435
143	485
86	435
171	481

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firm of the Cabinet Makers' Union, the appellants were the owners of one-sixth of said amount, and the appellees were the owners of five-sixths of said sum of \$2,319.28, which, with the interest thereon, was then due and unpaid. Wherefore the appellees prayed judgment for said sum of \$2,319.28 and interest, and an accounting of the affairs of the Cabinet Makers' Union, and that said debt be paid in proportion to the several interests or liabilities of the members of the Cabinet Makers' Union, and for other proper relief.

The bill of particulars filed with the complaint stated an itemized indebtedness of "L. R. & O. I. Thomas," for articles of furniture, etc., to "The Cabinet Makers' Union."

The cause was put at issue and tried by the court, and, at the appellants' request, the court made a special finding of facts and stated its conclusions of law thereon in writing, to all of which the appellants excepted. Over the appellants' motion for a new trial, the court rendered judgment against them, in accordance with its conclusions of law.

The first error complained of in argument, by the appellants' counsel, is this: "The court erred in its conclusions of law and judgment, upon the special finding of facts." We are of the opinion that this error is well assigned. It may be premised that the fundamental fact, alleged by appellees in their complaint, is the fact that, on the 5th day of March, 1868, the appellees and the appellants were partners in business, under the firm name and style of "The Cabinet Makers' Union." The complaint then proceeds upon the theory, although the fact is not alleged, that this partnership had been dissolved, or had, at least, ceased from active business. It is averred, substantially, that all the indebtedness of the firm had been paid, and that the affairs of the partnership had all been settled, except the dealings of the firm with the individual members thereof. The appellees also alleged that the appellants, as individual members of the firm, were indebted to the firm itself in a large sum of money, for goods sold and delivered, etc. The complaint prayed judgment, *inter alia*, for an ac-

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counting of the firm's affairs; and if it stated a cause of action at all, it was for such an accounting between the members of the firm and with the firm. Upon the issues joined on this complaint, by general denial and by special answers and replies, the court made its special finding of facts, in substance as follows:

"1st. That, in the spring of 1868, a partnership was formed in Connersville, Ind., under the firm name of 'The Cabinet Makers' Union of Connersville,' for the manufacture and sale of cabinet furniture.

"2d. That said firm was composed of the following members, to wit: Wilson T. Dale and James K. Rhodes, partners under the firm name of Dale, Rhodes & Co., as one member, and Wm. G. Plummer, George Garum, Andrew Mackridge and Thomas J. McMahon, as the other members.

"3d. That the defendants Lewis R. Thomas and Oliver I. Thomas were partners at the same time and afterwards, in the purchase and sale of furniture, under the name of L. R. & O. I. Thomas.

"4th. That said Lewis R. Thomas was not a member of the firm known as The Cabinet Makers' Union, neither was Oliver I. Thomas a member of said firm, nor was the firm of L. R. & O. I. Thomas a member of said firm.

"5th. That said firm, The Cabinet Makers' Union, ceased to manufacture furniture about the 1st day of July, 1868.

"6th. That on and prior to the 27th day of October, 1868, said firm of The Cabinet Makers' Union sold and delivered to said firm of L. R. & O. I. Thomas furniture, etc., of the value of \$2,319.28.

"7th. That said firm of L. R. & O. I. Thomas has paid said firm of The Cabinet Makers' Union on said amount in finding 6 above, the sum of \$2,068.60, leaving a balance unpaid, of principal, of \$250.68.

"8th. That all the debts of The Cabinet Makers' Union have been paid, except such as may be due from it to its own members; and,

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“9th. That there are debts due from The Cabinet Makers’ Union to individual members of the firm.”

Upon the foregoing facts the court stated as its conclusion of law, that the appellees were entitled to recover of the appellants the sum of \$250.68 of principal, with interest at the rate of six per cent. per annum, for twelve years, amounting to the sum of \$180, making of principal and interest the aggregate sum of \$430.68; for which sum, as we have seen, the court rendered judgment.

It will be observed that all the facts in issue in this case were found by the court in favor of the appellants. Outside of the matters in issue, the court made certain findings of facts and thereon based its conclusion of law, and rendered judgment accordingly. This can not be done. In *Boardman v. Griffin*, 52 Ind. 101, the court said: “When the trial of a cause is by the court, instead of a jury, whether the court is required to find the facts specially or not, it can not, any more than a jury, go outside of the case made by the pleadings. In such cases, as well as in others, the parties must recover upon the allegations of the pleadings. They must recover *secundum allegata et probata*, or not at all. It must be so, in the nature of things, so long as our mode of administering justice prevails. It would be folly to require the plaintiff to state his cause of action and the defendant to disclose his grounds of defence, if, on the trial, either or both might abandon such grounds and recover upon others, which are substantially different from those alleged.” To the same effect, substantially, are the following cases: *Town of Cicero v. Clifford*, 53 Ind. 191; *Denbo v. Wright*, 53 Ind. 226; *Terry v. Shively*, 64 Ind. 106; *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1. See, also, the case of *Arnold v. Angell*, 62 N. Y. 508, where the facts and proceedings below had been very similar to those in the case we are now considering, and where the Court of Appeals of New York reversed the judgment below upon the ground that it was for an entirely different cause of action

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from that stated in the complaint, and was not justified by the issues in the cause.

It follows from what we have said, that, in our opinion, the court clearly erred in its conclusion of law upon the facts specially found.

The judgment is reversed, with costs, and the cause is remanded, with instructions to the court to set aside its conclusion of law, and, in lieu thereof, to state as a conclusion of law, upon its special finding of facts, a finding for the appellants, and to render judgment accordingly.

No. 9677.

STARRET v. BURKHALTER ET AL., EXECUTORS.

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147	119

PLEADING.—Agreement.—Presumption.—Under the code, the averment of facts from which the law will presume an agreement is equivalent to an averment that such agreement was made.

PROMISSORY NOTE.—Release of Surety.—Interest.—Extension of Time.—Answer.—An answer by a surety to a suit on a note, that he was such surety, of which the payee had notice; that, without his knowledge or consent, the payee received from the principal, after maturity of the note, to wit, on, etc., a given sum as and for interest on the note one month in advance from that date, whereby the time of payment was extended, is good on demurrer.

SAME.—Decedents' Estates.—Witness.—Competency.—In a suit by the payee of a note against the executor of the surety, the principal maker of the note was a competent witness, under the statute in force prior to 1881, to prove that the surety had been discharged by giving time; but, in such case, the payee was not a competent witness for himself, unless required by the court to testify.

WITNESS.—Impeachment.—Bill of Exceptions.—A witness, who has been asked no questions concerning the contents of a bill of exceptions containing his evidence on a former trial of the cause, can not be contradicted by reading the bill of exceptions in evidence.

INSTRUCTIONS.—When the court has fully instructed the jury concerning every question in the case, there is no error in refusing further instructions upon particular points.

From the Superior Court of Tippecanoe County.

Starret v. Burkhalter et al., Executors.

J. L. Miller, M. Jones, M. W. Miller, J. R. Coffroth and T. A. Stuart, for appellant.

J. M. LaRue and F. B. Everett, for appellees.

ZOLLARS, J.—This cause was commenced originally by appellant, as the payee of a promissory note, against Moses A. Lentz and Edward Burkhalter, as the makers of said note. Burkhalter answered that he was surety for Lentz, which was known to appellant; that the time of payment had been extended, and he thereby released as such surety.

A judgment was rendered in favor of appellant against Lentz for the amount of the note and interest, and in favor of Burkhalter. Appellant appealed to this court, where the judgment in favor of Burkhalter was reversed. *Starret v. Burkhalter*, 70 Ind. 285. After the return of the cause to the trial court, appellees, as the executors of the will of Edward Burkhalter, he having died, were made parties defendants, and a judgment was rendered in their favor. The note in suit is for \$500, dated September 25th, 1869, due one day after date, with interest at ten per cent. Endorsements upon the note show payments of \$50 on the 25th of September for the years 1870 to 1876, both inclusive.

Upon being made parties, appellees filed an answer in one paragraph, in lieu of former answers by Edward Burkhalter. Appellant demurred to this answer; the demurrer was overruled, and he excepted. This ruling is assigned for error in this court.

The answer, after admitting the execution of the note by Edward Burkhalter, proceeds as follows: "But they say that said note was executed by the said Edward Burkhalter, then in life, as the surety of said Lentz, of which fact said plaintiff at the time of the execution of said note had full knowledge; and that after said note became due, viz., on the 25th day of August, 1873, said Lentz, without the knowledge of said Burkhalter, paid, and said plaintiff received, \$4.16 interest in advance on said note, from said 25th day of August,

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1873, until the 25th day of September, 1873, as follows: on said 25th day of August, 1873, said Lentz sold to said Starret a buggy and harness for the sum of \$260; Starret paid said Lentz \$210, and, as both knew that said Lentz had, prior to that time, fully paid the interest on said note to the 25th day of September, 1872, they then agreed that the residue of the price of said buggy should then be paid by said Lentz and received by said Starret, in full satisfaction of the interest on the debt, evidenced by said note, for the year ending September 25th, 1873; whereby the time of the payment of said debt was, by the receipt of said sum so paid as interest as aforesaid, extended, in consideration of the receipt of interest for one month in advance, from said 25th day of August, 1873, to said 25th day of September, 1873; all of which was done by said Lentz and said plaintiff, without the knowledge and consent of said Edward Burkhalter, and was never afterwards ratified or assented to by him; wherefore the defendants say that said decedent, in his lifetime, was released from all liability on said note, and they, as his executors, are now released."

In order that a surety on a note may be released, in this State, by an extension of the time of payment, there must be an agreement between the payee, or holder of the note, and the principal maker, for a definite and fixed time of extension, made without the knowledge or consent of the surety, founded upon a new consideration, and with the knowledge of the suretyship on the part of such payee or holder. *Butterfield v. Trittip*, 67 Ind. 338; *Buck v. Smiley*, 64 Ind. 431, and cases cited; *Sample v. Martin*, 46 Ind. 226; *Jarvis v. Hyatt*, 43 Ind. 163.

Counsel for appellant urge very strenuously that the answer is not good, for the reason that it does not contain a specific statement that the time of payment was extended by the agreement of the appellant and Lentz. We have examined the answer with considerable care, and, while we do not commend it as a model plea, we think that under former rul-

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ings of this court and courts of other States having codes similar to ours, it states sufficient facts to withstand the demurrer. It contains positive statements that Burkhalter signed the note as surety only, and that this fact was, at the time, known to appellant; that on the 25th day of August, 1873, after the note became due, four and $\frac{16}{100}$ dollars was paid by Lentz, the principal maker, and received by appellant, as interest in advance, from the 25th day of August, 1873, to the 25th day of September, 1873; that by *agreement* the amount so received was to be in full payment of the interest until the 25th day of September, 1873.

It is further stated that the time was extended, and that the consideration for the extension was the receipt of interest for one month in advance, from the 25th day of August to the 25th day of September, 1873. Upon these facts the law implies an agreement to extend the time of payment during the period for which the interest was paid in advance. *Hamilton v. Winterrowd*, 43 Ind. 393; *Woodburn v. Carter*, 50 Ind. 376; *Jarvis v. Hyatt*, 43 Ind. 163. Under our practice it seems to be sufficient to state the facts from which the law implies an agreement, in a case of this kind, without a specific allegation of such agreement.

In *Hamilton v. Winterrowd*, *supra*, this court, Mr. Justice WORDEN delivering the opinion, say: "There is, to be sure, no allegation of an agreement to forbear for three months and a half, but the facts are stated from which the presumption of such an agreement arises. The doctrine of implied agreements rests on presumption. * * Presumptions of law, however, need not be stated in pleading. 2 G. & H. 111. It follows that under our code it is sufficient to state facts from which the law implies an agreement, without in terms averring the agreement. * This is also the rule in New York." We do not agree with counsel that this is a dictum, and hence not authority. See, also, *Hamilton v. Winterrowd*, 43 Ind. 398.

In this case, as in the case under consideration, the answer of the surety does not contain an averment of an express agree-

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ment to extend the time of payment. It contains a statement that, by agreement, interest was paid and received in advance; and that the time was extended. This answer was held good. See also *Wills v. Wills*, 34 Ind. 106; *Gwaltney v. Cannon*, 31 Ind. 227; *Jordan and Skaneateles Plank Road Co. v. Morley*, 23 N. Y. 552. In this case it is said: "There is no force in the objection that a formal promise by the defendant to pay the amount alleged to be due him for tolls, is not stated in the complaint. In pleading under the Code, it is sufficient to state the facts from which the law infers a liability, or implies a promise."

In this discussion we have taken the positive and material statements of the answer, omitting conclusions of law and the particular statements as to the manner of the payment of interest in advance. Counsel contend that these statements show that the extension of the time of payment was not in the minds of the parties, and that the consideration of the credit of interest was simply the sale and purchase of the buggy and harness. We can not concur in this view. There is nothing in the plea tending to show that the credit of interest in advance was in any way a condition of such sale or purchase. Possibly, if the buggy and harness had not been purchased by appellant, interest would not have been paid at that time; but it does not follow from this that the implied agreement to extend the time of payment did not exist. When the parties "agreed" that \$50 of the purchase-money should be applied to the payment of interest to become due on the 25th day of September following, they both understood, and impliedly agreed, that the payment of the note should be delayed until that time.

It is stated in the answer that the interest was paid in advance without the knowledge of the surety. In the latter part there is the further statement: "All of which was done by said Lentz and said plaintiff without the knowledge and consent of said Edward Burkhalter, and was never afterwards ratified or consented to by him."

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Counsel for appellant contend that these allegations do not amount to an averment that the extension was without the consent of the surety. We think that the facts are so stated "as to enable a person of common understanding to know what is intended." 2 R. S. 1876, p. 53, sec. 49. Upon a fair construction, the plea amounts to a statement that the surety had no knowledge that the interest should be, or was, paid in advance, or that the time should be, or was in fact, extended. If he had no such knowledge of the transaction, surely he did not give his consent to the extension. A surety might have knowledge of such an extension, and not object, but it is difficult to see how he could give his consent to a transaction of which he has no knowledge.

On the trial of the cause, Lentz, the principal maker of the note, was allowed to testify as a witness, over the objection of appellant. This is urged as error. The statute in force at the time of the trial disqualified parties as witnesses in suits in which an executor was a party, and a judgment might be rendered for or against the estate represented by such executor. 2 R. S. 1876, p. 133; Acts 1879, p. 245.

Upon the first trial, a judgment was rendered against Lentz for the amount due on the note, which was in force at the time of the second trial. Upon that trial there was no issue to be tried between appellant and Lentz; nor was there any issue between Lentz and appellees. As to any issues to be then tried, Lentz was out of court. The issues for trial were between appellant and the appellees, as the representatives of Edward Burkhalter, deceased, the alleged surety. Lentz was called as a witness by appellees to establish the facts set up in the answer. We think that he was a competent witness for this purpose. *Upton v. Adams' Ex'rs*, 27 Ind. 432; *Dodds v. Rogers*, 68 Ind. 110. Under the statute, appellant was not competent as a witness against the executor. The action of the court in declining to require him to testify is not an available error. In that matter the court exercised a discre-

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tion given by the statute, and we can not say that in this case the discretion was not properly exercised.

We find in the record what purport to be three bills of exceptions. The first was filed on the sixty-fifth day of the January term, 1881. At the succeeding March term the motion for a new trial was overruled; a motion for judgment in favor of appellant, notwithstanding the verdict, was filed, and the case was "continued by operation of law." Two days after this, a second bill of exceptions was filed. This bill was filed after the expiration of the term succeeding that at which the trial was had. The record does not show that time was asked or given to file it. It is, therefore, no part of the record, and nothing contained in it can be considered in deciding the case. *Lee v. Hills*, 66 Ind. 474.

The first bill shows that, after the testimony of Lentz was concluded, appellant, for the purpose of contradicting his statements, offered in evidence a bill of exceptions purporting to contain his testimony on the first trial. This the court excluded, and we think correctly. The attention of the witness had not been called to any statements contained in the bill so offered. He had no part in the making of it, no opportunity to see that it contained a correct statement of his testimony, and was, hence, not in any way responsible for what might be therein contained. The bill so offered was made and filed for the purpose of the former appeal to this court, in which appeal the witness was neither a party nor in any way interested. To have admitted the bill in evidence, under the circumstances, would have been unfair to the witness and an error in practice. *Glenn v. State, ex rel. Clore*, 46 Ind. 368.

Appellant further contends that the trial court erred in its instructions, and in refusing to give an instruction asked by him. The court instructed the jury, in substance, that, as to the matters set up in the answer, the burden of proof was upon the appellees; that if the jury should find from the evidence that Burkhalter, deceased, was surety on the note, and appel-

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lant knew of that fact, and that after the note become due, Lentz, the principal maker, paid and appellant received interest in advance, then, in the absence of any evidence to the contrary, the law implies an agreement to extend the time of payment during the time for which interest was so paid in advance; and that such extension, if without the consent of said surety, released him and his estate from liability on the note. The jury was further instructed that if the surety had consented to the extension of time alleged, or had at any time before the alleged payment of interest in advance, consented to the extension of time to the 25th day of September, 1873, the payment of the interest in advance, if so paid, did not release him; that, in determining all of these questions, the jury should consider the facts and circumstances before them; and that the payment of interest in property, if accepted by appellant as cash, would be the same as if paid in money.

We think these instructions state the law correctly, and cover all of the issues in the case. The instruction asked by appellant is as follows: "In order to extend the time for the payment of the note in suit there must be an agreement for a definite time of extension, and the payment of interest in advance is a good consideration to sustain an agreement to extend the time; but the payment of interest, without any agreement to extend the time, will not extend the time on the note."

There was no error, we think, in refusing this instruction. The court had already correctly instructed the jury upon every issue in the case. This instruction might have misled the jury, as they would, doubtless, have understood from it that the agreement must be an express agreement, and not one which the law implies from such payment of interest in advance.

The last question to be considered is the sufficiency of the evidence to sustain the verdict. The whole of the evidence in the cause on the part of the appellees is the testimony of Lentz. For the purposes of this decision we are confined to that, and can not look to his testimony on the former trial.

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We have, however, examined it, and find that it differs very materially from his testimony under consideration. If it did not, we should, as we did on the former appeal, reverse the judgment for the want of sufficient evidence. But we can not call in question the truthfulness of Lentz's testimony, as contained in the record before us. Time and reflection may have convinced him that his former statements, if indeed they were accurately given in the bill of exceptions, were not correct. However that may be, his testimony went to the jury, they gave it credence and based their verdict upon it. As it comes to us, it establishes the facts set up in the answer, and is, therefore, sufficient. Brandt Suretyship, sec. 299; *Hayes v. Fitch*, 47 Ind. 21.

What we have already said makes it unnecessary to notice the question raised by appellant's motion for judgment.

There being no available error in the record, the judgment is affirmed, at the costs of appellant.

No. 9835.

HALE ET AL. v. TALBOTT.

86	417
141	448

SHERIFF'S SALE. — *Appraisement.* — *Return.* — *Evidence.* — *Presumption.* — A sheriff's sale of lands upon an execution subject to appraisement, where the return is silent as to the subject of appraisement, is supported *prima facie* by the presumption that the officer did his duty, and unless this presumption be overcome by sufficient evidence, the purchaser's title will be held good.

From the Tippecanoe Circuit Court.

G. S. Orth, J. Park and S. T. Stallard, for appellants.

M. Jones and J. L. Miller, for appellee.

MORRIS, C.—The appellee commenced this suit in the Benton Circuit Court to recover the possession of, and to quiet his title to, forty acres of land situate in Benton county, In-

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diana. After the cause had been once tried in the Benton Circuit Court and a new trial granted, the venue was, by the agreement of the parties, changed to the Tippecanoe Circuit Court. The second trial in the Tippecanoe Circuit Court resulted in favor of the appellee. The appellants moved for a new trial. The motion was overruled, and final judgment was rendered in favor of the appellee. The overruling of the motion for a new trial is assigned as error.

The ground upon which a new trial is asked is the want of sufficient evidence to support the finding of the court. The appellee introduced testimony showing that John G. Osborn, on the 5th day of September, 1852, purchased the land in controversy from the United States; that he, on the 4th day of November, 1853, sold and conveyed said land to the Cincinnati, Peru and Chicago Railroad Company; that on the 1st day of April, 1858, one George Barnes recovered a judgment against said railroad company in the LaPorte Circuit Court for the sum of \$1,674.57 and costs of suit; that said judgment was rendered with relief from appraisement laws, and was, on the 18th day of March, 1867, by Mary L. Barnes, administratrix of said George Barnes, then deceased, assigned to one E. L. Dickey, who, on the 6th day of August, 1872, assigned said judgment to the appellee; that on the 21st day of May, 1873, said judgment was revived in the name of the appellee; that on the 6th day of June, 1873, an execution was issued on said judgment, directed to the sheriff of Benton county, which did not waive relief from appraisement laws; that, on the 19th day of July, 1873, the sheriff of Benton county sold said land to the appellee, who was the highest bidder for the same, and on the same day the sheriff executed and delivered to the appellee a deed conveying to him the land in dispute. Neither the return of the sheriff upon said execution nor other evidence introduced by the appellee affirmatively shows that the sheriff had caused said land to be appraised.

The appellants introduced upon the trial Henry C. Harris

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as a witness, who testified that he was acquainted with the defendants below, but not with the plaintiff; that he was the sheriff of Benton county during the year 1873, and that as such sheriff he sold the land in controversy to the appellee upon an execution directed to him from the LaPorte Circuit Court, and that he executed to the appellee the deed offered in evidence by him; that he had no recollection of the land having been appraised; that he caused the usual legal notice of said sale to be published in the Oxford Tribune, a weekly newspaper of general circulation in the county where the real estate was situate. A newspaper was handed to him, which was identified by him as the Oxford Tribune, bearing date June 25th, 1873, and his attention was then called to a notice of said sale in these words:

“Sheriff’s Sale: Notice is hereby given, that by virtue of an execution issued by the clerk of the LaPorte Circuit Court, etc., I will expose at public sale, etc, on Saturday, July 19th, 1873, between the hours of, etc., the following described real estate, etc. Said real estate taken as the property of the Cincinnati, Peru and Chicago Railroad Company, etc. Said sale will be made without relief from appraisement laws,” etc. This notice was read in evidence by the appellants. The witness then stated that he had no recollection of the land having been appraised; that he had a recollection of the land having been sold aside from the notice and the return to the execution; that he recollected that Mr. Miller was present at the time of the sale, and that he bid off the land for Mr. Talbott. If he had the land appraised, he thought it would have been referred to and made a part of his return to the execution; that he did not think that the land was appraised. The witness then proceeded as follows: “I scarcely think I should have sold on such a writ as this without appraisement; my impression is I did not appraise; I would not say positively that I did not.”

The question contested by the parties is, whether the land

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in controversy was sold by the sheriff to the appellee without or with appraisement, and we have stated all the testimony in the case bearing upon this question.

If the land was sold without appraisement, the sale was void, and the appellee has no title to the land. The appellee must recover upon the strength of his own title, and not upon the weakness of the title of the appellants. It was, therefore, for him to show that the sale was legally made. As neither the judgment nor execution waived the appraisement law, the burden of showing that the sale was made subject to appraisement rested upon the appellee.

By proving the sale as hereinbefore stated, the law raises a presumption that the officer had done his duty and caused the land to be appraised before offering it for sale. Upon such proof, the appellee was entitled to recover unless the testimony introduced by the appellants was sufficient to overcome the presumption that the officer had, in selling the land, acted in accordance with the requirements of the law. *Evans v. Ashby*, 22 Ind. 15.

The sheriff, who made the sale, testifies that he has no recollection of causing the land to be appraised; that he thinks it was not; that his impression is that it was not appraised; that he thinks he would not have sold the land on such an execution without appraisement; that he can not say positively that the land was not appraised. The sheriff testified some eight years after the sale was made, and his opposing inferences, thoughts and impressions seem to neutralize his testimony, and leave unimpaired and unaffected the presumption that, in making the sale of said land, he did his duty. Nor do we think the fact that it was stated in the notice that the sale would be made without relief from appraisement laws would justify this court in holding, in opposition to the finding of the court below, that the sale had not been legally made. The return of the sheriff upon the execution, put in evidence by the appellee, stated that the notice of sale had been published in the Benton Tribune, not in the Oxford

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Tribune. The court below having heard all the evidence, found the sale to have been validly made. Under the rulings of this court we should not, upon conflicting presumptions and inferences, disturb the finding of the court below. We think there is no available error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 9873.

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88	451
141	51
88	451
145	341
88	451
151	193

VENDOR AND VENDEE.—*Married Woman.*—*Vendor's Lien.*—A woman's right in land in virtue of her marriage is subject to the lien of the vendor for the purchase-money thereof.

SAME.—*Remedy to Enforce Vendor's Lien.*—A vendor of land, having an equitable lien thereon for purchase-money, may seek his legal remedy upon his money demand, together with the enforcement of his lien in one action; but he may first pursue his remedy upon his legal claim alone, without thereby waiving his right to afterwards resort, if necessary, to the equitable enforcement of his lien.

SAME.—*Complaint.*—A vendor's lien on land for unpaid purchase-money is: not an original and absolute charge on the land, but only an equitable right to resort thereto if there be not sufficient personal assets; and in an action to enforce such lien, if the complaint do not allege and the evidence show that the vendee has no other property subject to execution, the judgment should not direct the sale of the land except in the event that no other property of the vendee, subject to execution, can be found to satisfy the execution.

SAME.—*Husband and Wife.*—*Widow of Vendee.*—*Partition.*—*Quieting Title.*—*Counter-Claim.*—*Sheriff's Sale.*—In an action by a widow for partition and to quiet her title, as to an undivided third of a tract of land, an answer by the defendant, that he had sold the land, with other lands, on credit, to the plaintiff's husband; that for the unpaid purchase-money he obtained a personal judgment against the husband, who had no personal property, and, with his consent and that of the plaintiff, he purchased the tract in controversy on execution issued on his judgment, bidding the full amount thereof, and received a sheriff's deed therefor in 1855, and the husband

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died in 1866, is insufficient on demurrer; and the same facts are insufficient as a counter-claim, either to quiet the defendant's title or to enforce a vendor's lien.

SAME.—Waiver of Lien.—Taking a personal judgment for the purchase-money of land, and selling the land on execution to satisfy it, is a waiver of the vendor's lien.

SAME.—When the purchase-money is in any manner satisfied, the vendor's lien ceases, and can not afterwards be enforced.

QUIETING TITLE.—Complaint.—A complaint to quiet title, which fails to aver that the defendant makes any claim to the title or possession, is insufficient.

SHERIFF'S SALE.—Married Woman.—A purchaser at a sheriff's sale in 1855 of a husband's land on execution, under an ordinary judgment against him alone, took it free from any claim of the wife during the husband's lifetime, and forever free therefrom upon her death leaving the husband surviving, but subject to her right to a one-third interest if she should survive the husband.

From the Tipton Circuit Court.

N. R. Lindsay and J. W. Kern, for appellant.

R. B. Beauchamp and G. H. Gifford, for appellee.

BLACK, C.—The appellee sued the appellant, the complaint being in two paragraphs. In the first, partition was sought of certain land in Tipton county, of which, it was alleged, appellant and appellee were the owners in fee simple as tenants in common, the share of appellee being the undivided one-third. In the second paragraph it was sought, in the usual form, to quiet appellee's title to the undivided one-third of said land against appellant's claim to some adverse interest therein. Appellant answered by a general denial, and filed also three other paragraphs numbered second, third and fourth. Demurrers to these three paragraphs were sustained. The general denial was then withdrawn, and judgment was rendered upon demurrer for the appellee. The rulings upon the demurrers are assigned as errors, but the only questions argued by counsel for appellant arise upon the demurrer to the second paragraph. The other specifications in the assignment of errors will therefore not be further noticed. The second paragraph purported to be pleaded as "for answer and cross

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complaint," and it was demurred to as an answer and also as a cross complaint.

It alleged, in substance, that in the year 1854 appellant was the owner in fee of certain land described, in said county, including the land described in the complaint; that in that year he sold the land so owned by him to one Daniel Fouch, who was then the husband of appellee, and who died in 1866, leaving appellee his widow, for \$2,500, taking two notes therefor from said Daniel, each for \$1,250; that no security for said notes or either of them was taken by appellant from said Daniel; that he afterward paid to appellant one of said notes in full and a small portion on the other, and, said Daniel failing and refusing to pay further on the latter note the balance due appellant for purchase-money of said real estate, appellant, on the 9th of August, 1855, conveyed said real estate to said Daniel by deed of general warranty, signed by appellant and his wife, and on or about that day brought suit on said last mentioned note, in the Tipton Circuit Court, and, on the 25th of September, 1855, a judgment was rendered thereon against said Daniel and in favor of appellant for \$1,052.30, which was the balance due from said Daniel to appellant for the unpaid purchase-money of said real estate; that said Daniel failing to pay or replevy said judgment, or in any way secure the payment thereof, appellant, on the 11th of September, 1856, caused execution thereon to be issued by the clerk, directed to the sheriff, which went duly into his hands and was by him, on the 19th of December, 1856, by and with the knowledge, advice and consent of said Daniel "and this plaintiff, being as defendant was, at the time, without personal property subject to execution, levied upon" certain land described, being a portion (two-thirds) of the land so conveyed by appellant to said Daniel, and including the land described in the complaint; that said sheriff thereafter duly advertised the land levied on for sale, as required by law, and, on the 17th of January, 1857, sold it at public sale to appellant, who bid

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therefor \$1,026.66 $\frac{2}{3}$, the full amount of said judgment and costs, and that being the highest and best price bid therefor, and he being the highest and best bidder, the land was properly struck off to him by said sheriff for that price; that said sheriff on the same day executed to appellant a deed for said real estate, which he, on the same day, caused to be recorded, etc. The pleading then states that appellant having purchased in said real estate on a judgment for unpaid purchase-money, which was paramount to appellee's claim, she ought not to recover in this action. It is then prayed that, upon a final hearing of this cause, appellant's title to said land be quieted, and that appellee be barred from ever setting up any claim or demand to the same, and that appellant have other proper relief. Copies of the final entry of said judgment and said sheriff's deed are made exhibits, and it is alleged that the papers in said action against Daniel Fouch and the execution having been lost, they therefore can not be exhibited.

The undivided share claimed by the appellee in her complaint was one-eighteenth of the land alleged by appellant in his pleading to have been sold to appellee's husband, and one-twelfth of that alleged to have been bought by appellant at said sheriff's sale.

By the provisions of sections 27 and 35 of the statute of descent, 1 R. S. 1876, pp. 413, 414, the husband of appellee having during their marriage been seized in fee simple of the real estate described in the complaint, and she not having joined in a conveyance thereof in due form of law, but the land having been sold by virtue of an execution to which she was not a party, she, having survived her said husband, was entitled to the share claimed by her, and had a right to have partition, unless the other facts stated in appellant's pleading precluded her.

A woman's right in land in virtue of her marriage, while it remains inchoate, or after it has become consummate by the death of her husband, is subject to the lien of his vendor for the purchase-money of the land. *Crane v. Palmer*, 8

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Blackf. 120; *Fisher v. Johnson*, 5 Ind. 492; *Talbott v. Armstrong*, 14 Ind. 254; *Carver v. Grove*, 68 Ind. 371. What may be her right to redeem need not be decided here.

Under the statute in force at the date of the sheriff's sale mentioned in appellant's pleading, upon a sale of the husband's land on execution under an ordinary judgment against him alone, the wife's inchoate interest was not affected; the purchaser took the land free from any claim of the wife during the husband's lifetime, and forever freed therefrom upon her death, leaving the husband surviving, but subject to her right to one-third thereof if she should survive her husband.

Whatever may have been the proper mode of proceeding under the old practice, the vendor of land having an equitable lien thereon for purchase-money may, under the modern procedure, seek his legal remedy upon his money demand, together with the enforcement of his lien, in one action. But he may, as formerly, first pursue his remedy upon his legal claim alone, without thereby waiving his right to afterward resort, if necessary, to the equitable remedy by enforcement of the lien. *Turner v. Horner*, 29 Ark. 440; *Clark v. Hunt*, 3 J. J. Marsh. 553; *Ball v. Hill*, 48 Tex. 634; *Dibblee v. Mitchell*, 15 Ind. 435; *Crowfoot v. Zink*, 30 Ind. 446; *Humphrey v. Thorn*, 63 Ind. 296.

A vendor's lien on land for unpaid purchase-money is not an original and absolute charge on the land, but only an equitable right to resort to it if there be not sufficient personal assets. *Martin v. Cauble*, 72 Ind. 67, 75, and authorities there cited. It is not an equitable estate in the land. It is a right to have a lien established by decree of a court in the particular case. Sugden Vend., Perkins ed., 671, *n* (d¹).

In an action to enforce a vendor's lien on land, if the complaint do not allege and the evidence show that the vendee has no other property subject to execution, the judgment should not direct the sale of the land in the first instance, but should be for the amount of the debt established, with a proper entry that it is for purchase-money, and that the land is subject to

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execution to satisfy the same in the event that other property of the vendee subject to execution can not be found. *Scott v. Crawford*, 12 Ind. 410; *Bowen v. Fisher*, 14 Ind. 104; *McCauley v. Holtz*, 62 Ind. 205; *Overly v. Tipton*, 68 Ind. 410; *Martin v. Cauble*, *supra*.

The lien may be waived without the extinction of the debt by any act which indicates that the vendor does not rely upon the lien, as by taking other security. When the lien is once abandoned, fairly and voluntarily, it is abandoned forever. *Mattix v. Weand*, 19 Ind. 151. Where it has been once lost by the vendor, a court can not revive it for him. *Burger v. Potter*, 32 Ill. 66. Whether it will be barred before the expiration of the period of prescription, where the debt for the payment of which it is an equitable security is barred by a shorter period of limitation, is a question concerning which the authorities are conflicting, those which maintain the negative proceeding upon the doctrine that the operation of the statute of limitations does not extinguish the debt, but the statute may be interposed to prevent the enforcement thereof by action. However this may be, the lien can have no existence if there be no debt. It is unpaid purchase-money that creates and sustains the lien. *Nichols v. Glover*, 41 Ind. 24. A complaint to enforce the lien should fully describe the contract of sale and aver the non-payment of the purchase-money. *Hough v. Canby*, 8 Blackf. 301.

The statute in relation to the settlement of decedents' estates, in force when this cause was commenced, required that a statement of every claim against a decedent's estate, "except judgments which are liens upon the decedent's real estate, and mortgages of his real or personal estate obtained and executed in his lifetime, and expenses of administration," be filed in the office of the clerk of the proper court, within one year from the date of the first appointment of the executor or administrator therein, and notice thereof, and that no other court should have original jurisdiction of any claim, except such liens, against the estate of any decedent, and that after

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the expiration of said year, if such claim was not filed at least thirty days before final settlement of the estate, it should be barred, except as provided in said statute in case of the liability of heirs and devisees to any unpaid creditor who, six months prior to such final settlement, was insane, an infant or out of the State. Sections 62, 178, 2 R. S. 1876, pp. 512, 554.

In *Linthicum v. Tapscott*, 28 Ark. 267, where it was sought to enforce a vendor's lien against the estate of a deceased vendee, it was held to be a good defence that it was not presented to the administrator within two years from the granting of letters of administration, as other claims. *Overly v. Tipton*, *supra*, was an action against the heirs of the vendee to enforce a vendor's lien and to reform a mistake in the vendor's deed. The complaint alleged that the deceased vendee left no personal estate, and that no letters of administration had ever been issued on his estate. The court said: "Ordinarily, the creditor of a decedent can not collect an unsecured debt from the decedent's estate, except by and through an administration of such estate. *Leonard v. Blair*, 59 Ind. 510. A vendor's lien can not be enforced, as a rule, unless it is alleged and shown by the evidence that the vendee or debtor has no other property subject to execution, except the property against which the lien is asserted and sought to be enforced." And it was held that if the deceased vendee had been possessed of other property subject to execution at the time of his death, it might have been claimed very properly that the administrator of his estate was a necessary party to the action.

No remedy upon the legal claim for purchase-money owed by a decedent could in any case be obtained, where there was no administration of his estate. *Leonard v. Blair*, *supra*, and authorities cited. By analogy to the practice in other cases, it may be proper to seek the collection of the legal claim and the equitable remedy of enforcement of the lien together, and to make the heirs and the administrator defendants, instead of first filing the legal claim against the estate, and afterward,

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for a deficiency, pursuing the equitable remedy against the land in the possession of the heirs. But, in a suit wherein the administrator is not a party, and in which, therefore, no remedy can be obtained on the legal claim, the complaint must show that the decedent did not leave other property out of which the claim for purchase-money could be collected.

We have a statute (sec. 640, code of 1852; sec. 1105, R. S. 1881), which provides that "Whenever an execution shall issue upon a judgment recovered for a debt secured by mortgage of real property, the plaintiff shall endorse thereon a brief description of the mortgaged premises; and the equity of redemption shall in no case be sold on such execution."

In *Linville v. Bell*, 47 Ind. 547, where, on an execution issued under a judgment on a portion of the notes secured by a mortgage on real estate, the sheriff sold the mortgaged property, he and the purchaser knowing that it was mortgaged to secure the debt for which the judgment was rendered, the levy and sale being made in the absence of the judgment plaintiff, the mortgagee, and his attorney, and without their knowledge or consent, it was held that the purchaser acquired no right which would prevent the mortgagee from foreclosing the mortgage and selling the land thereunder.

In *Youse v. McCreary*, 2 Blackf. 243, it was held that there was nothing in the statute of 1824 to prevent the holder of a bond secured by mortgage on real estate from proceeding first upon his bond and selling the mortgaged property on execution, and thus electing to abandon the mortgage; and that, by selling the mortgaged premises on his execution, he waived any right he might have had under the mortgage.

In *Clark v. Stilson*, 36 Mich. 482, where the holder of a vendor's lien on land caused the land to be sold on execution under a judgment rendered for the debt for which he claimed the lien, and he became the purchaser at such sale, it was held that the sale on execution was inconsistent with any claim of lien; and it was said by COOLEY, C. J., referring to a statute similar to sections 640 and 1105, *supra*, that a vendor's lien

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being in the nature of an equitable mortgage, and the statute not permitting the equity of redemption to be sold on execution for the satisfaction of the mortgage debt, the sale thereof on execution would seem to negative the claim of lien.

Appellant's said second paragraph was not sufficient as a counter-claim to recover possession of real estate, or to quiet title thereto, for the reason, if for no other, that it did not allege that appellee was in possession of the land, and unlawfully keeping appellant out of possession, or that she was claiming any title or interest therein adverse to him. Sec. 592 *et seq.*, code of 1852.

Regarded as an answer to the second paragraph of the complaint, there could have been no error in sustaining a demurrer to it, if it could be regarded as stating facts sufficient to constitute a defence; for, under the general denial, which was also pleaded, all matters of defence could have been given in evidence. Secs. 596, 612, code of 1852; *Graham v. Graham*, 55 Ind. 23.

Treating it as an answer to the first paragraph of the complaint, it was not sufficient. It showed that appellee's husband was seized in fee of the land in question during the marriage; that, under an execution issued on an ordinary personal judgment rendered against him alone, during the marriage, it had been sold and conveyed by the sheriff to the appellant, the execution plaintiff, and that appellee's husband had since died. If it could be said that it showed that appellant had a vendor's lien on the land, it did not show that his equitable right had ever been enforced, and the possession of a mere right to enforce a vendor's lien could have no potency as a defence to an action by the owner of a portion of the land for partition.

In *Fisher v. Johnson*, 5 Ind. 492, it was held that a vendee who had paid no part of the purchase-money might, by releasing his title to his vendor, cut off the right of the wife of the former to dower, at least unless she should redeem.

In the paragraph under examination it was alleged, that,

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“by and with the knowledge, advice and consent of the said Fouch and this plaintiff, being as defendant was, at the time, without personal property subject to execution,” the execution was, by the sheriff, levied upon the real estate.

The want of personal property or the direction of the debtor would be sufficient reason for the sheriff's levying an ordinary execution on the debtor's real estate. It does not appear that appellant was induced by the advice and consent alleged to forego his equitable remedy. He pursued his legal remedy and took what might be obtained thereby.

Without enquiring as to the right of a widow where her deceased husband was seized during the marriage of real estate for which he had paid a portion of the purchase-money, and released his title to his vendor in payment of the remainder thereof, we think the advice and consent here alleged of the appellee and her husband did not affect her marital interest in the land.

Regarding the pleading under discussion as a counter-claim to enforce a vendor's lien, it was bad. If it had shown a subsisting indebtedness for purchase-money, it did not show that the deceased husband left no other property subject to execution out of which the claim might not have been collected. By showing the levying of the execution upon the land upon which the execution plaintiff held the lien, and the sale and conveyance to him, it showed his election to release his lien on the land sold, even if the debt had not been fully paid by the sale. But, further, it showed that there was no subsisting indebtedness for purchase-money. The judgment was for the unpaid balance of purchase-money, and the sale was for the full amount of the judgment, which was thereby satisfied. Through his proceedings at law appellant's claim for purchase-money was satisfied, and nothing remained for which to claim a vendor's lien.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

Cornelius v. Coughlin.

No. 9945.

CORNELIUS v. COUGHLIN.

SUPREME COURT.—*Weight of Evidence.—Verdict.*—Where the evidence in the record tends to sustain the verdict of the jury on every material point, the Supreme Court will not disturb the verdict, nor reverse the judgment, on the weight or sufficiency of the evidence.

From the Tipton Circuit Court.

J. W. Robinson, for appellant.

D. Waugh, for appellee.

Howk, J.—This suit was commenced by the appellee against the appellant, before a justice of the peace of Tipton county. Before the justice the appellee recovered judgment for the sum of twenty-four dollars and costs; from which judgment an appeal was taken by the appellant to the circuit court of the county. There the cause was tried by a jury, and a verdict was returned for the appellee in the sum of fifty dollars; and over appellant's motion for a new trial the court rendered judgment on the verdict.

The only error assigned by appellant is the decision of the court in overruling his motion for a new trial. In this motion the causes assigned for such new trial were as follows:

- "1. The verdict of the jury is contrary to law;
- "2. The verdict of the jury is not sustained by the evidence;
- "3. The verdict of the jury is contrary to the evidence; and,
- "4. The verdict of the jury is excessive to above the sum warranted by the evidence."

From these causes for a new trial, it will be readily seen that the only question presented for our decision is this: Is there legal evidence in the record which tends to sustain the verdict of the jury on every material point? If there is such evidence in the record, and we think there is, it is very clear that, under numerous decisions of this court, the judgment below must be affirmed. This court will not weigh evidence,

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nor attempt to determine its preponderance as between the parties to the suit. The rule which governs the court, in such a case as the one at bar, and the reasons for such rule, will be found in many reported decisions of the court, and need not be repeated here. *Cox v. The State*, 49 Ind. 568; *Rudolph v. Lane*, 57 Ind. 115; *The Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Hayden v. Cretcher*, 75 Ind. 108.

Appellant's counsel claims, that "a full and final settlement was conclusively shown by the evidence, and neither fraud nor mistake is charged in relation thereto, as a reason why it should not be upheld." We think counsel mistakes the evidence on the point in question. Appellee was a widow, and appellant was the administrator of the estate of her deceased husband. She had dealings with appellant, as such administrator, on account of her claims against her deceased husband's estate; and she also had dealings with him personally. There was evidence introduced from which the jury might have fairly found that the alleged settlement was procured through appellee's mistake, or by the fraud and deceit of the appellant. It is manifest from their verdict, that the jury did not believe that the alleged settlement was full, final or fair; and we can not say from the evidence that their verdict was erroneous or excessive.

The court did not err, we think, in overruling the motion for a new trial.

The judgment is affirmed, with costs.

86	469
127	502
86	462
143	428



No. 9427.

THE CITY OF WASHINGTON v. SMALL.

CITY.—*Street.—Sidewalk.—Negligence.—Pleading.*—A complaint against a city to recover for an injury in consequence of a defective sidewalk, averring that the sidewalk had been negligently left out of repair and dangerous for two months, of which the city had notice; that when

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walked upon it tipped, because its support had been washed away, in consequence of which the plaintiff, in passing, without fault, and being ignorant of danger, slipped and fell, etc., sufficiently shows care by the plaintiff and negligence by the defendant.

SAME.—Degree of Vigilance.—A city is bound to use active vigilance to discover and repair defects in its streets and sidewalks, while the traveller must use ordinary care to avoid injury.

NEW TRIAL.—Newly-Discovered Evidence.—Bill of Exceptions.—Affidavits.—Affidavits showing newly-discovered evidence in support of a motion for a new trial, are no part of the record unless made so by bill of exceptions.

From the Daviess Circuit Court.

J. W. Ogdon, —Tharp, J. H. O'Neill and D. J. Hefron, for appellant.

J. T. Pierce, W. R. Gardiner and S. H. Taylor, for appellee.

MORRIS, C.—The appellee sued the appellant to recover damages for an injury caused by a fall on the sidewalk of the city, alleged to have been caused by a defect in the sidewalk. The complaint consisted of three paragraphs. A demurrer was sustained to the first and second paragraphs and overruled to the third. The third paragraph is, in substance, as follows:

The defendant is, and for ten years last past has been, a municipal corporation, incorporated under the general laws of the State of Indiana; on the 27th day of February, 1880, there was, and is, in said city of Washington, a certain street, called New street, running east and west, from Will street to East Eleventh street, in Turner's addition to said city; there was then, and now is, a planked sidewalk running along the north side of said street, forming part of said street, which sidewalk the appellant was bound to keep in repair; that, on said 27th day of February, 1880, and for more than two months prior thereto, said sidewalk was and had been greatly out of repair, and dangerous for pedestrians to walk upon; that that part of it within the corporate limits of said city, where the injury herein named occurred, by reason of a ditch dug by the appellant along the side of said sidewalk, and the

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wear and wash of the soil along the same, and the removal of props and supports from under the south side of said planked sidewalk, it became tipped and slanting upon the south side thereof, and would sink and yield for want of support under the weight of persons walking upon the south side, and thereby trip passengers; that the appellant negligently suffered said sidewalk along the travelled part thereof to be and remain in said condition and out of repair, and dangerous to pedestrians, for two months at and before said time, although it had notice thereof, and that said sidewalk was out of repair; that appellee, on said 27th day of February, 1880, while walking along and upon said sidewalk, as she lawfully might, without knowledge of its dangerous and unsafe condition, and with due and proper care, and without fault on her part, but solely because of the defective condition of said sidewalk, slipped and fell on said sidewalk, and thereby severely hurt and bruised her body, and especially her right hip and leg, which by said fall were so torn, twisted and broken that she has lost the use of the same for life, suffered great pain, and been put to great expense, etc.

The appellant answered the third paragraph of the complaint in four paragraphs. The court, on motion of the appellee, rejected the second, third and fourth paragraphs of the answer, to which the appellant excepted. The cause was submitted to a jury for trial, who returned a verdict for the appellee. The appellant moved the court for a new trial. The motion was overruled and final judgment rendered for the appellee.

Errors are assigned as follows:

1. The court below erred in overruling the appellant's demurrer to the third paragraph of the complaint.
2. The court erred in sustaining the appellee's motion to reject the second, third and fourth paragraphs of the appellant's answer.
3. The court erred in overruling the appellant's motion for a new trial.

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We think the court did not err in overruling the demurrer to the third paragraph of the complaint. The complaint states that the defective sidewalk was within the corporate limits of the appellant; that it was its duty to keep the sidewalk in repair; that it knowingly suffered the sidewalk to get out of repair and remain so for two months; that the appellant constructed a ditch along the sidewalk, which, with the wash of the soil along the same, and the removal of the support and props under the south side of said plank walk, caused it to become tipped and slanting, and to yield some six or eight inches on the south side under the weight of a person walking upon it; that while walking upon this defective sidewalk, with due care and in ignorance of its defective condition, she, because of said defects, fell and was injured.

The question which the appellant's counsel say they wish to submit is, whether, "if the sidewalk was really out of repair as averred, and for the reasons stated, it is not clear, from a fair interpretation of the complaint, that the defects were so patent and visible to the eye that they might have been discovered by the exercise of ordinary care."

We think, upon the facts stated, it can not be held as a conclusion of law, contrary to the express averments of the complaint, that the appellee necessarily knew, or might, by the exercise of ordinary care, have known, that the supports under the south side of the plank walk had been removed, so that, under the weight of a person walking upon the plank, the south side of the walk would yield and make it unsafe. True, had she inspected the ditch and looked under the walk to see if the props and supports were in proper place and condition, she might have discovered that they had been removed, and from this discovery she might have inferred that, for want of support, the walk would yield under the weight of passengers and become tipped and dangerous. But the law imposed no such duty of inspection upon the appellee. She had a right to act upon the assumption that the sidewalk was in safe con-

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dition. She had a right to assume that the appellant had discharged its duty to the public, and that the sidewalk was safe. True, if she could see that it was in an unsafe condition and dangerous, and, with knowledge of its defective condition, ventured upon it, she must be held to have assumed the risk. But she avers that she did not know that the sidewalk was unsafe. We can not say that, as matter of law, she must have known the contrary of what she avers.

It is said that it is not averred that the appellee did not know that the ditch had been dug, nor that the props under the south side of the walk had been removed. She avers that she had no knowledge of the dangerous condition of the sidewalk, and that she was without fault. If she was in fact ignorant of the defect, and was without fault, she must have exercised reasonable care. The averment that she was injured without fault on her part was equivalent to averring that she could not, by reasonable diligence, have known that the supports under the walk had been removed. This was sufficient. *Town of Salem v. Goller*, 76 Ind. 291; *Town of Elkhart v. Ritter*, 66 Ind. 136; *City of Fort Wayne v. De Witt*, 47 Ind. 391.

Nothing is said in the appellant's brief in support of the second error assigned. The alleged error is properly waived, as the matters set forth in the rejected paragraphs were admissible in evidence under the general denial.

The grounds for a new trial are that the verdict is not supported by sufficient evidence, and is contrary to law, because the damages are excessive, and because of newly discovered evidence.

If there was any evidence given in the cause which legally tended to support the verdict of the jury, this court will not disturb it on the ground that it is not sustained by sufficient evidence. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Abshire v. Williams*, 76 Ind. 97.

The appellee testified that she fell upon the sidewalk; that she was injured; that she did not know that it was dangerous and out of repair; that her fall was caused by the tipping of

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the sidewalk to the south ; that there was a fence on the north of and adjoining the sidewalk ; that it sunk when walked upon much less on the side next to the fence than it did on the south side.

The appellee testified that she had passed over the sidewalk the day before she received the injury complained of, and that she had, some time prior to that, passed over it frequently. Several witnesses, officers and employees of the appellant, testified that the sidewalk had been out of repair, but that, before the accident complained of occurred, it had been repaired.

Daniel Rafferty testified that he repaired the sidewalk in January or February, 1880 ; that the dirt had washed out from under the south side of the walk, so that it slanted to the south ; that the walk was a good walk, made of oak plank ; that he repaired it by putting railroad ties under the plank ; that when he repaired the sidewalk it was two or three inches lower on the outside than on the inside, and would sink about three inches more. The witness does not state whether he repaired the walk before or after the appellee was hurt, but it appears from the testimony of other witnesses that it was after the accident. Robert Gebner, who assisted in making the repairs, says it was in March, 1880, and then testified that the walk slanted and swagged about five inches to the south.

John Guting testified that he was, in February, 1880, a councilman of the city ; that he lived three lots from New street, and occasionally passed over the sidewalk, and frequently over that part where the appellee was hurt, and never noticed it in bad condition ; that no one would notice the bad condition of the sidewalk unless they stepped on it ; then it would give way and the outside would drop lower than the inside.

John Kamade testified that he lived on New street ; that the sidewalk was in bad condition for the length of three planks, which were about ten feet each ; that the planks were in bad order by slanting from the inside to the outside about six inches ; when walked upon the plank would move out to

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the south and sink at the outside two or three inches more than on the inside; that at the time the appellee was hurt, one could not get round the defective sidewalk without crossing the street through the mud; that the planks slanted about four inches without any one on them, but if one got on the walk, five or six inches; a person of ordinary observation could see that the sidewalk was out of repair and dangerous.

Mrs. Cool testified to the condition of the appellee, who was her mother, and to the condition of the sidewalk. She says the walk did not slant much till one got on it.

Ellen Kamade testified that she lived near the sidewalk, and that it was unsafe; that it would sink on the south side when walked upon; that both sides of the walk would yield when walked upon, but that it would sink towards the street; that the sidewalk was repaired soon after the appellee was hurt; that Mrs. Cool had fallen on the sidewalk at the same place where the appellee fell; that her little boy had slipped and fell at the same place and on the same day that the appellee fell; that the bad part of the sidewalk extended some two or three yards, and when one stepped on it it went down on the outside as much as six inches, and on the inside three or four.

Mrs. Myers testified that she lived on New street, "and had lived there ever since July, one year ago;" that she came to town on the north side of the street; that there was no other way to come; that she lived half a square from where the appellee fell; that the sidewalk had been in bad condition ever since she lived there; that it was worse when the plaintiff fell, and one would have to walk off the planks because they were so slanting; there were no pieces of timber under the walk then, but there are now; that she passed over the sidewalk two or three times a week; that it was out of repair for the distance of half a square; no one would notice the bad condition of the walk unless they tramped on it; it was impossible for any one to pass over the sidewalk in daylight without noticing its bad condition.

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It was not incumbent upon the appellee to search for defects in the sidewalk. In passing along and upon it she assumed the risk of such dangers only as were apparent to persons of ordinary observation and of her age and condition. She might have passed over the sidewalk, as she swears she did, the day before she was injured, without becoming aware of its dangerous condition. Had she walked along the north side of the walk and close to the fence, as she probably did, she would not have been likely to notice its unsafe condition. The sidewalk yielded but little, comparatively, on the north side. It was only when the passenger stepped upon the south side that the walk tipped and became dangerous. We can not say, upon the testimony, that the appellee was not, when injured, ignorant of the dangerous condition of the sidewalk, and free from fault. The jury having found in those respects in her favor, we can not disturb the verdict on the ground that she was guilty of negligence. *Waters v. Wing*, 59 Pa. St. 211; *City of Indianapolis v. Gaston*, 58 Ind. 224.

In the case of *Bloomington v. Chamberlain*, recently decided by the Supreme Court of Illinois, and published in 14 Reporter, 744, it was held that the degree of care which the law requires a plaintiff to exercise while passing over a sidewalk, to entitle him to recover for an injury received from its defective condition, is ordinary care, under all the circumstances of the case; that a person passing over a defective sidewalk is not as a matter of course bound to go into the street and pass around it, especially when the defect is merely loose boards, and the walk is not palpably dangerous. Here the sidewalk was clearly out of repair. The appellee had passed over it the day before without injury. It is not clear that the defect was palpable to her.

Does the evidence in the case tend to show that the appellant had notice, actual or constructive, of the defective and dangerous condition of its sidewalk, in time to have repaired it before the appellee was injured? The appellant insists that it had not. If the jury believed, as they had a right to

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believe, the testimony of Mrs. Myers, they would be justified in concluding that the sidewalk, upon which the appellee was injured, had been out of repair and unsafe for many months—so long, indeed, as to charge the appellant with constructive notice of its condition. It was the duty of the appellant to keep its sidewalks in repair and reasonably safe for passengers, and the discharge of this duty obviously and necessarily imposed upon its officers reasonable attention to, and active observation of, its streets and sidewalks. The reasonably vigilant discharge of their duties in this respect could not fail to bring to their notice defects in the sidewalk which had existed for any considerable time. The law upon this subject is thus stated in the case of *Todd v. City of Troy*, 61 N. Y. 506. The court says: “Before the city can be made liable in any case, it must be shown that it had notice of the bad condition of the street. This notice can be either express or constructive. By constructive notice is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see that they are kept in a reasonably safe condition for public travel. They can not fold their arms and shut their eyes, and say they have no notice. After a street has been out of repair, so that the defect has become known and notorious to those travelling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence. *
* Upon the trial there was some evidence that, near the place where the accident occurred, a conductor had for a long time come down from a house discharging water upon the sidewalk, * * and for some days before the accident there was ice” across the sidewalk, covered with a sheet of snow, upon which the plaintiff, etc. “It was a question for the jury to decide, whether it was negligence for” the city to let water overflow and ice to remain there for several days. “It was also a question for the jury to decide whether the existence of this state

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of things," which "must have been seen by many persons, ought to have been known to the defendant; in other words, to decide whether the defendant was guilty of negligence in not knowing facts so notorious. Upon these questions there was some evidence, I admit not very strong, and the jury decided them in favor of the plaintiff; and their decision, having been approved" by the trial court, "is conclusive upon us."

In the case before us, some eight witnesses testified to the notoriety of the defect in the sidewalk. One witness testified that the defect had existed for months. It was for the jury to decide whether the appellant should have known of the defect, and whether, if it did not, it was, under the circumstances, guilty of negligence. There was some evidence, to say the least of it, upon those questions, and the jury decided them in favor of the appellee. Their decision has been approved by the court below, and must be held to be conclusive here. The verdict can not, for this reason, be disturbed. *City of Logansport v. Justice*, 74 Ind. 378-385 (39 Am. R. 79); *City of Indianapolis v. Scott*, 72 Ind. 196.

We can not say that the damages assessed were excessive. According to the evidence the appellee was seriously injured, and her entire recovery from the injury is quite uncertain. It does not appear from the evidence that the jury erred in the assessment of the damages.

The affidavits as to the newly-discovered evidence for which a new trial is asked were filed with the motion for a new trial and are copied into the record as a part of that motion; but they are not made a part of the record by bill of exceptions. We can not, therefore, regard them as a part of the record. *Marks v. Jacobs*, 76 Ind. 216; *Fryberger v. Perkins*, 66 Ind. 19.

There is no available error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

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86	472
126	414

No. 9108.

WILSON ET UX. v. WILSON.

CONVEYANCE.—Consideration.—Defeasance.—Condition Subsequent.—When a conveyance is made upon no consideration except certain *terms* specified in a separate writing made by the grantee to the grantor, the terms stated must be regarded as expressive of conditions subsequent, for a breach of which a forfeiture of the estate may be had.

SAME.—Real Estate, Action to Recover.—Pleading.—Copy of Deed.—In an action to recover land for breach of conditions contained in a defeasance executed by the grantee of a deed, a copy of the deed need not be made a part of the complaint.

SAME.—Improvements.—Rents and Profits.—In an action for the recovery of land for breach of conditions subsequent, there may be an accounting as to rents and improvements, and the fact of improvements can not be used as a bar to the action, though made by a subsequent purchaser of the land.

SAME.—Defeasance.—Record.—Notice.—Volunteer.—An unrecorded defeasance, notwithstanding section 2932, R. S. 1881, is good as against a volunteer who receives a conveyance of the land without notice of the defeasance. A volunteer stands in the shoes of his grantor.

WITNESSES.—Evidence.—Constitutional Law.—Vested Rights.—Constitutional restrictions for the protection of vested rights do not affect legislation concerning the competency of witnesses.

SAME.—Husband and Wife.—Statute Construed.—The act of 1879, Acts 1879, p. 245, making husband and wife competent to testify for or against each other, applies to occurrences before as well as after the passage of the act.

From the Delaware Circuit Court.

J. N. Templer and *R. S. Gregory*, for appellants.

J. F. Duckwall and *W. March*, for appellee.

WOODS, C. J.—The principal question in this case arises upon the demurrer to the complaint. The action is by the appellee; and the substance of his complaint is, that, being the owner of certain real estate, he did, on the 14th day of April, 1875, convey the same to his son Leroy O. Wilson, who neither paid nor agreed to pay a valuable consideration for the conveyance, but, contemporaneously with the execution of the deed, and as a part thereof, executed and delivered to the plaintiff a writing, of the tenor following, to wit:

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“Know all men, that I have this day received from my father and mother, Volney and Elizabeth Wilson, a deed of lot,” etc. (description omitted), “valued at six thousand three hundred dollars, on the following terms, to wit:

“1st. If, at my father’s death, there is not an equal valuation at that time (not now) left to my brothers John A. Wilson and Harry V. Wilson, I am to pay to them that which is to make us all equal in valuation.

“2d. I bind myself not to make any changes in said property without my father’s full consent, and that I will not go security or put my name on any bond, note or other instrument of writing for any one without his consent, and will not, under any circumstances, contract a debt of any kind that will involve said lots; that I will, to the best of my ability, take care of and not sell or dispose of the above mentioned lots without the full consent of my father and mother, while they or either of them live, and pay tax of ’75. Witness my hand and seal this 14th day of April, 1875.

[Signed]

“LEROY O. WILSON. [L. S.]”

That, at the date of the conveyance, the defendant Harriet J. Wilson was and still is the wife of her co-defendant, the said Leroy; that, on the 14th day of September, 1875, said Leroy conveyed the property by deed to his wife, the said Harriet, who paid no consideration, and had notice of the contract aforesaid, and of the terms and conditions upon which the conveyance to her husband had been made; that said conveyance was made to her without the knowledge or consent of plaintiff or his wife, and that, by reason of the facts, the estate of said Leroy has been terminated and forfeited, and revested in the plaintiff; that, on the 11th day of January, 1876, the defendants, without the knowledge or consent of the plaintiff or his wife, conveyed the property to William Orr, in trust, to reconvey the same to the said Harriet; that on the next day Orr reconveyed by quitclaim deed; that Orr paid no consideration for the conveyance to him, and Harriet

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nothing for the reconveyance to her; that plaintiff has demanded possession, etc. Wherefore, etc.

Our conclusion is that, upon the facts alleged, the conveyance by the appellee to his son was upon condition that he comply with the covenants of the instrument set out in the complaint. There was no other valuable consideration for the deed, and, unless the instrument can operate as a defeasance, it is difficult to see how, in respect to some, at least, of its terms, it could be enforced, or be made effective in any way. It may be said that the covenants contained in the writing are personal covenants merely, but that can not affect the conclusion that the deed was made on condition that they be faithfully kept and performed. *Leach v. Leach*, 4 Ind. 628; *Hershman v. Hershman*, 63 Ind. 451; *Lindsey v. Lindsey*, 45 Ind. 552; *Andrews v. Spurlin*, 35 Ind. 262.

“The word ‘condition’ is not necessary to the creation of a condition.” Any words that convey the proper meaning will be sufficient; *Stilwell v. Knapper*, 69 Ind. 558, 570 (35 Am. R. 240); and when in this case the conveyance was made upon specified *terms*, and for no other consideration, the terms stated must be regarded as expressive of conditions subsequent, a breach of which might forfeit the estate.

The objection is made that a copy of the deed from the appellee to his son was not made part of the complaint; but that instrument was not the basis of the action, nor was an exhibit of its terms necessary to a construction of the defeasance. *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310.

In *Leach v. Leach*, *supra*, it is decided that in such a case there may be an accounting between the parties in respect to rents and profits and improvements; it follows that the effort of the appellant Harriet to plead improvements made by her as a bar to the action was unavailing.

Another proposition asserted by the appellant Harriet is, that it was necessary for the appellee to show that notwithstanding she was a volunteer, and paid no consideration for the conveyance made to her, she had actual knowledge of the

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defeasance under which the appellee seeks to recover the land. This, it is claimed, is the meaning and force of the 17th section of the act concerning conveyances, R. S. 1881, section 2932, which provides in reference to separate instruments of defeasance, that "the original conveyance shall not thereby be defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded, according to law, within ninety days after the date of said deed."

Such statutes in regard to notice are not to be construed as applying to volunteers so as to protect them, as against the rightful owner, in the assertion of titles for which they paid nothing. To all legal intents and purposes the volunteer must ordinarily be treated as one who, in respect to equities affecting the title of the land, stands in the shoes of his grantor. See *Mendenhall v. Treadway*, 44 Ind. 131. The disastrous consequences of a different ruling on this point are too evident to require comment or illustration.

It is claimed that the court erred in permitting the defeasance to be read in evidence before proof was made that the appellant Harriet had notice of it when she took the title; there was, however, no error in this, even if the proof of notice had been necessary. *Tuttle v. Churchman*, 74 Ind. 311; *Goings v. Chapman*, 18 Ind. 194; *Pittsburgh, etc., R. W. Co. v. Conway*, 57 Ind. 52.

There was no error in permitting the appellee to testify that he received no consideration, save the defeasance, for the conveyance to his son, and that the subsequent conveyances were made without his consent.

It was not error to permit the wife of the appellee to testify in reference to facts which occurred before the act of March 15th, 1879, Acts 1879, p. 245, whereby she was made a competent witness, took effect.

The constitutional restrictions for the protection of vested rights do not embrace legislation in respect to the competency

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of witnesses. The act making husband and wife competent witnesses for or against each other applies, therefore, to occurrences before as well as after its passage. *Heagy v. State, ex rel.*, 85 Ind. 260, and cases cited.

Upon the question whether the defeasance was made contemporaneously with the conveyance to which it refers, or at a recent date, it was competent for the appellee to prove by a witness that he had seen the instrument at a time stated, when the appellant Harriet was not present. The material point of the testimony was the existence and identity of the paper—a fact which could not be different on account of the presence or absence of the appellant.

The offer of the appellant to prove that the appellee and her husband were acting in concert in efforts, by this action and by suits theretofore instituted, to deprive her of the property, was plainly irrelevant, and therefore was properly overruled. The evidence so offered had no legitimate tendency to show that the defeasance was a false contrivance, made in aid of this action, and antedated to correspond with the deed.

It follows, from what has already been decided, that the special instructions asked, in so far as they differed from those given, were properly refused. In fact, once the conclusion is adopted that the title was conveyed by the appellee subject to a condition or conditions subsequent, other questions in the various phases in which they have been presented and argued become practically and comparatively unimportant.

Judgment affirmed.

No. 10,138.

TEAGARDEN v. McLAUGHLIN.

TORTS.—*Infant.*—*Negligence.*—*Parent and Child.*—*Liability of Parent.*—Where a minor son, by contract with his father, cleared a parcel of land, and in doing so negligently set fire to and burned property belonging to a ten-

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ant, the father was not shielded by his contract from liability for the injuries resulting from his son's negligence.

SAME.—Instruction.—Contributory Negligence.—Question of Law or Fact.—An instruction, in an action for such injuries, which assumes that certain facts constitute contributory negligence, should be refused unless such facts show that the question of negligence is one merely of law.

SAME.—Lessor and Lessee.—In such case, the fact that the lessee, the plaintiff, had agreed to allow the lessor, the defendant and owner of the land, "one-half the pasturage on said land," did not entitle the lessor to enter for the purpose of burning logs, stumps and brush, thus endangering the tenant's property.

From the Howard Circuit Court.

C. N. Pollard, for appellant.

J. F. Elliott and *L. J. Kirkpatrick*, for appellee.

ELLIOTT, J.—Property belonging to the appellee was burned by fire, negligently and wrongfully set out by the son of the appellant. The son had contracted with the father to clear the parcel of land on which the property was situated for a designated price, and, in carrying out this contract, set out the fire which destroyed appellee's property. At the time the contract was made the son was not of full age, and was living with his father and treated as a member of his family. The appellant asked an instruction affirming that, if the work of clearing the land had been let to the son as an independent contractor, and the injury resulted from his negligence, the appellee could not recover. The court refused to give this instruction, and this ruling presents the principal question in the case.

A son not of full age, who undertakes to do work for his father, can not be regarded as an independent contractor in such a sense as to shield the father, who employs him to do work, from injuries resulting from his negligence. It would be pushing the rule absolving an employer from liability for the negligence of an independent contractor to an unwarrantable extent to extend it to the case of a father who contracts with his minor son. The reason, upon which rests the rule holding employers not liable for the negligence of indepen-

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dent contractors, fails where the contractor is the infant child of the employer. The reason supporting the rule is, that the employer has no control over the acts of the contractor in the performance of the work, and ought not to be held responsible for that over which he has no authority or power. The right to control is the test by which to determine whether the relation of employer and contractor exists. 2 Thompson Neg. 906. In legal contemplation, the minor child is within the control of the parent, and there can be no doubt that, as a general rule, the theory of the law corresponds with the actual fact. Not only does the principle we have referred to require that it should be held that a father can not evade responsibility for the negligent manner in which his minor son does an act, which he commanded to be done, but there are other strong reasons leading to the same conclusion. If a man were permitted to escape liability upon the ground here relied on, it would be easy to perpetrate great wrongs, and leave the injured person to proceed against irresponsible persons under legal disabilities; and it would also open a way for unscrupulous persons to evade liability for torts committed in their behalf, by wrongfully shifting the responsibility to those subject to their commands. The general rule is, that a father is not responsible for the torts of his minor child; but this rule does not apply to cases where the tort is committed by the child while engaged in performing work directed by the father. Where a child is engaged in the father's service, and in doing work authorized or commanded by him, he is responsible for loss resulting to others from the negligence of the child.

An instruction which assumes that certain facts constitute contributory negligence should be refused unless the facts stated are such as would make it proper for the court to decide the question of negligence as one of pure law. In this case, the question of contributory negligence was one of fact for the jury, and the court did right in refusing to instruct

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that certain facts, hypothetically stated in the instruction prayed, constituted contributory negligence.

The appellee was the tenant of the appellant under a lease demising to him the property described in it, and containing this provision: The lessee agrees to allow the lessor "one-half the pasturage on said land," and it is contended that the instrument did not give the appellee such possession as enabled him to maintain this action. This position is untenable. The lease vested in the lessee a right of possession to the land subject only to the lessor's right to one-half the pasturage, and this right of possession was sufficient to entitle the lessee to his action for a wrongful and unlawful entry upon the land. The general rule is that a tenant in rightful possession may maintain trespass against his landlord, and the lease under examination did not affect the operation of the rule except in so far as to vest in the landlord a right of pasturage. It is clear that it did not entitle him to enter for the purpose of burning logs, stumps and brush, thus endangering the tenant's property.

Judgment affirmed.

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No. 9569.

•ANTHONY ET AL. v. STURGIS ET AL.

INJUNCTION.—Trespass.—Damages.—An injunction to restrain a threatened trespass, which can be compensated in damages, will not be granted.

SAME.—Illegal Tax.—Tax Duplicate.—County Treasurer.—Complaint.—A complaint, averring that a county treasurer has demanded and endeavored to collect from the plaintiff a certain illegal tax placed by the auditor unlawfully upon the tax duplicate of the county, but not averring that such duplicate had ever come to the hands of the treasurer, furnishes no ground for injunction against either the auditor or treasurer.

From the Wells Circuit Court.

T. S. Walterhouse, for appellants.

J. S. Dailey and *L. Mock*, for appellees.

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MORRIS, C.—The appellants brought this suit to enjoin the collection of a ditch assessment.

The complaint, consisting of one paragraph, states that the appellants are the owners in fee of the s. w. qr. of section 34, township 26 n., of range 11 e., in Wells county, Indiana; that on the — day of June, 1878, the appellees, Henry Snow, Nelson Coddington (since deceased), and A. H. Ludlum, filed with the board of commissioners of said county their petition asking for the construction of a certain ditch or drain, which they alleged would affect the lands of the appellants; that said board of county commissioners, in accordance with the prayer of said petition, appointed viewers to examine the route of the proposed ditch and report thereon; that afterwards, on the 20th day of January, 1879, said viewers made their report, and assessed as benefits to the said land of the appellants, by reason of the construction of said ditch, the sum of \$——; that, upon the filing of said report and the assessment of said viewers, said board of county commissioners, on said 20th day of January, 1879, made the following order, which they caused to be entered upon the record of their proceedings of that date, to wit: “Proof of publication and posting of notices as required by law being on file, and no remonstrance being presented, the board establishes the said Corne’s ditch, according to the above report, and orders the said viewers to return and set stakes at the boundaries of each party’s assessment, and apportion such expenses and set a — for the payment of the same, and make report of the same at the next term of this court.”

It is further stated that there was no hearing of the petition by the board, and no evidence of any kind introduced before the commissioners, that said proposed ditch was or would be conducive to the public health, convenience or welfare, or that it would be of public benefit or utility, nor that the board had at any time made any finding that the proposed ditch work was conducive to the public health, convenience or welfare, or of public benefit or utility, and that no evidence had ever been

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introduced before said board going to establish the fact that said ditch was necessary and conducive to the public health, convenience or welfare, or of public benefit or utility.

It is also further averred that afterwards, on the 23d day of October, 1880, the appellee Elmore Y. Sturgis, auditor of Wells county, offered for sale the portion of said ditch assessed and allotted to the lands of the appellants, and sold out the same for the sum of \$——, and caused the said ditch to be constructed through and across the lands of the appellants, without right and without authority of law, and entered the amount so necessary for the construction of said ditch upon the tax duplicate of said county, as a tax and lien upon the said lands of the appellants, whereby said pretended assessment, together with the interest, penalty and costs, became and now is a pretended and apparent lien upon said land; that the appellee Popejoy, treasurer of said county, has demanded of the appellants the amount of said tax, and endeavored to collect the same, alleging that it was a valid tax and lien upon said lands; that, on the — day of February, 1880, the record of said board of commissioners was, by some one unknown to appellants, without an order of the board, and without the knowledge or consent of the appellants, and without authority of law, fraudulently and falsely, with intent to wrong and defraud the appellants, altered and changed so as to make the same read as follows:

“The board finding that section 2 of the ditch law has been complied with, and that the said work will be conducive to the public health, and of public benefit and utility, and proof of publication and posting up of notices as required by law being on file, and no remonstrance being presented, the board establishes the said Corne’s ditch according to the above report, and orders the said viewers to return and set stakes at boundaries of each party’s assessment thereof, and apportion such expenses, and set a —— for the payment of the same, and make report of the same at the next term of this court.”

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It is averred that the assessment is void ; that the order of the board was made without any evidence ; that there was no finding by the board that the ditch would be conducive to the public health, convenience or welfare, or of public benefit or utility.

Prayer that the pretended tax be adjudged illegal and void ; that the appellees and all other persons connected with said ditch be forever enjoined from collecting said tax, etc.

The appellees appeared and demurred to the complaint, for the reason that it does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the appellants electing to stand by their complaint, judgment was rendered for the appellees.

The ruling of the court upon the demurrer is assigned as error.

It is not averred directly in the complaint that any specific sum had been assessed upon the appellants' land for the construction of said ditch, nor that any specific sum had been placed upon the tax duplicate of the county. From the facts stated in the complaint, it may be inferred that some amount, for the construction of said ditch, had been assessed upon the appellants' land, and that the sum so assessed had been placed by the auditor of the county upon the tax duplicate of the county. But what amount, whether substantial or otherwise, is not alleged, even argumentatively. It is averred that the treasurer of the county had demanded the tax, claimed it to be valid, and that he had endeavored to collect it. How the treasurer had endeavored to collect the tax, whether by demand and persuasion merely, or by legal authority, is not stated. It is not averred that the duplicate upon which the tax in question had been placed had ever been in the hands of the treasurer of the county, nor that he had taken, or endeavored to take, any steps in collection of the alleged illegal assessment other than as a mere trespasser. Under such circumstances, the appellants were not entitled to an injunction.

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In the case of *Brown v. Herron*, 59 Ind. 61, 64, it is said: "The complaint does not aver that the tax duplicate is in the hands of the treasurer, without which, having no power to make the levy, the act of levying would be a mere trespass, which can not be enjoined, because the remedy is complete in an action at law." *Board, etc., v. Hall*, 70 Ind. 469; *Porter v. Stout*, 73 Ind. 3; *Mullikin v. City of Bloomington*, 72 Ind. 161.

Upon the facts stated in this case, Popejoy, the treasurer, can not be enjoined, for the reason that the acts which he is alleged to have done do not authorize an injunction, and those which he is averred to have threatened to do amount to no more than a simple threat to commit a trespass, which may, if it should be committed, be fully compensated by an action at law.

There are no such facts alleged as would justify an injunction against the auditor. He had, before the commencement of this suit, done all that he could do; he had placed the assessment upon the tax duplicate; he had nothing more to do, nor is he charged with making any threats; nor is any one of the other appellees charged with any attempt to collect or enforce the collection of the tax. Popejoy, the treasurer, is the only one of the appellees who is charged with making any threats or attempts to enforce the assessment. We have endeavored to show that, as to him, the charge is not sufficient.

The appellees say they demur severally to the complaint, but, as they unite in one demurrer, it must be regarded as joint.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 10,282.

THE CITY OF VINCENNES ET AL. v. CALLENDER.

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180 8CITY.—*Corporate Powers.—Water-Works.—Contract with Water Company.—*

The act of March 25th, 1879, to authorize cities and incorporated towns to construct, maintain and operate water-works, etc. (secs. 3265 to 3285, R. S. 1881), does not repeal either in terms or by implication the 26th clause of sec. 3106, R. S. 1881, which provides, in effect, that the common council of an incorporated city may authorize any incorporated company or association to construct water-works, and that, in such case, the city may become part stockholder in any such company or association. Therefore, the contract of the city with the water company is not *ultra vires* and void.

From the Daviess Circuit Court.

F. W. Viehe and *R. G. Evans*, for appellants.

O. F. Baker, *G. G. Reily*, *W. C. Johnson* and *W. C. Niblack*, for appellee.

HowK, J.—In this action, the appellee, the plaintiff below, alleged in substance in his complaint, that he was a resident of the city of Vincennes, a city incorporated and existing under the general laws of this State for the incorporation of cities, and was the owner of property in said city, subject to taxation for all purposes connected with, or growing out of, the city government of such city; that the city was then, and on the 14th day of November, 1881, a city of less than forty thousand inhabitants, to wit, of a population not exceeding ten thousand; that on the 14th day of November, 1881, the city of Vincennes, by its common council, at the request, procurement and solicitation of the defendants Swift and Gray, in the form of, and purporting to be, an ordinance of the city, passed at a due and regular meeting of its common council, granted to said Swift and Gray, and their assigns, and to any company thereafter, certain franchises, privileges, powers and immunities, hereinafter specified and mentioned; that the ordinance referred to was entitled "An ordinance for the erection and maintenance of water-works in the city of Vin-

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œennes, Knox county, Indiana ;” that the parts of this ordinance, material to the questions in controversy in this case, were substantially as follows :

“Section 1. In consideration of the benefits, which will result to the city of Vincennes and its inhabitants from the erection and operation of water-works, there is hereby granted to Carroll E. Gray and William H. Swift, both of the city of St. Louis and State of Missouri, their associates, successors and assigns, the exclusive privilege of establishing, maintaining and operating water-works, and the construction of stand-pipes, reservoirs and other works and buildings necessary and sufficient in size for the operation of said works, and also the laying of mains, conduits and pipes, and the placing of fire hydrants in and along all streets, avenues, alleys and public grounds of the city of Vincennes, as the same now exists or may hereafter be extended, for supplying water, suitable for domestic and other purposes, for the term of fifty years from and after the completion of the works.

“Section 17. The said grantees shall, within sixty days from the passage of this ordinance, file with the city a written acceptance of the terms, obligations and conditions herein set forth, and, after the date of the filing of such acceptance, this ordinance shall be the measure of the rights and liabilities of said city and said water company. Said grantees, or their assigns, shall, within ninety days from the date of such acceptance, commence in good faith the construction of the said water-works, and diligently prosecute the same to completion and successful operation, within twelve months therefrom ; and in the event of failure to so complete said works, unless longer time for such completion be granted by the city council, said grantees or their assigns shall forfeit all exclusive rights herein granted.

“Sec. 18. And said Gray and Swift, and their associates or assigns, may organize as a corporation under the laws of the State of Indiana, provided they do so within sixty days from and after the passage of this ordinance, and said corporation

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may accept the provisions of this ordinance; and, when so accepted by said corporation, this ordinance shall be the measure of the rights and liabilities of said city and said corporation."

The appellee further alleged that the city of Vincennes (at the request and procurement of said Swift and Gray) made and entered into such alleged contract, whereby the city had assumed to grant and uphold the franchises, set out in said ordinance, to said Swift and Gray, and to pay them and their assigns for supplying the city with water for fire protection, at the rate of \$62.50 annually, for the period of fifty years, for each hydrant so to be placed by them in said city; that, by the terms of said ordinance, the city of Vincennes assumed to grant to said Swift and Gray and their assigns the exclusive right to furnish water to the citizens of Vincennes, without in any way requiring the water to be wholesome or fit for use; that said ordinance was wrongful and oppressive, and would result in great injury to the appellee and the citizens, in this: it did not require Swift and Gray or their assigns to furnish the citizens pure or wholesome water, nor water for manufacturing purposes. The provisions of the ordinance would entail an additional tax of at least \$9,000 annually for its alleged fire purposes, upon the property in the city. Appellee further said that, subsequent to the passage of said ordinance, to wit, on December 27th, 1881, the defendants Swift, Gray and Watson entered into alleged articles of association, styling themselves "The Vincennes Water Company," and filed said articles and duplicates in the recorder's office of Knox county, and in the office of the Secretary of State, by the terms of which they assumed to be a corporation, organized under the laws of this State, for the purpose of carrying out the terms of said ordinance; and these were the only acts of incorporation done and performed by said defendants, or by any other person, in the premises; that on the same day, but subsequent to the assumed organization of said corporation, said Swift and Gray executed to said pretended corporation a pretended

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assignment of the rights and privileges so granted to them by the terms of said ordinance; that thereupon, on the same day, the pretended corporation filed in the office of the clerk of the city of Vincennes a notice in writing, that such corporation accepted the said ordinance, and thereby claimed the benefits and franchises therein contained; that such pretended corporation claimed that all rights and franchises so granted by said city to Swift and Gray had thus passed and enured to said corporation.

The appellee further said that the ordinance aforesaid and all its provisions, and each and every stipulation, grant and contract contained therein, were illegal, invalid and void, and the same were wrongful and oppressive, and would work great injury to appellee in this, to wit:

1st. The city of Vincennes was, on November 14th, 1881, and since, a city of only 10,000 inhabitants; there had never been any election of the voters of the city, at which the question of building water-works in said city had been voted upon; and there had never been a majority of ballots, of any election in said city, in favor of building water-works.

2d. Said Swift and Gray were not of themselves, or with any other person or persons, at said day or any other day prior to December 27th, 1881, an incorporated company or association, under the laws of this State, for the purpose of supplying said city with water; and there was not, at November 14th, 1881, when said ordinance was passed, any legal authority under which the common council of such city could pass such ordinance; nor was there any law of this State authorizing the incorporation of a company or association for the purpose of erecting, carrying on or owning water-works, at that date or at any subsequent time.

3d. The city of Vincennes had no legal power, nor had its common council at said date or since, to contract and agree with Swift and Gray, or with their assigns, the Vincennes Water Company, to pay from the funds of said city or its revenues raised by taxation, or in any other manner, any money

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whatever for the erection of water-works, or the supplying the city with water, except upon a vote in favor of supplying the city with water by the legal voters of the city. The city of Vincennes had no money or funds on hand out of which the costs of maintaining the water-works could be paid, except as loans were made to the city from time to time, in anticipation of revenues to be raised by taxation; and the amount required under said ordinance, for the payment of the sum agreed to be paid for fire purposes, would largely increase the rate of taxation upon the property in said city, to wit, at least \$3 upon each \$1,000 dollars annually; and such additional tax would impose upon the appellee and other citizens of said city, costs and burdens which would be illegal and wrongful.

And the appellee said that the acts done and to be done by the defendants in the premises would wrong and oppress him and all other inhabitants and tax-payers of said city, in this:

1. They will unjustly increase the rate of taxation in said city, a ratable proportion of which would be assessed on appellee's property;

2. They would interfere with and prevent the city from establishing works for supplying the inhabitants with wholesome water for fifty years then to come;

3. By obstructing the streets they would interfere with the free use thereof for a long period of time;

4. They would unlawfully divert the revenues of the city from legal and proper purposes to improper and illegal uses, and to private gains and profit; wherefore, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee, and over appellants' motion for a new trial, the court rendered judgment on its finding for the relief demanded in appellee's complaint.

The city of Vincennes has been notified of this appeal by its co-defendants, and has appeared and declined to join in the appeal in this court. Errors are assigned here by the only appellants The Vincennes Water Company and Edward Watson, upon the decisions of the trial court in overruling their

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separate demurrers to appellee's complaint, and in overruling their joint motion for a new trial.

The adoption of the ordinance set out in appellee's complaint, and the acceptance of its provisions by the appellant, the Vincennes Water Company, constituted a contract between it and the city of Vincennes, if the common council of such city were authorized by law to pass such ordinance. Appellants' counsel say: "The power of the city to enter into a contract with a corporation for the erection of water-works, and for supplying the city and its inhabitants with water, will be questioned. We maintain that it had this power; and, as we understand, counsel on the other side will claim that the city had no such power, but that it can be supplied with water only by erecting works, as provided in the act of 1879, authorizing cities to erect water-works."

Appellee's counsel also say: "The question is not whether the city council acted wisely or prudently, but whether it had the right to act at all in the manner complained of. It is conceded that the city, upon compliance with certain terms of the law, may erect, own and maintain water-works. The question here is: Can it authorize private parties to construct, maintain and own the works, and contract with them for the supply of water?" And again: "As appellants and appellee agree that the only question for the consideration of the court is one of corporate power—a claim upon our part that the franchise asserted by appellants, as a grant from the city, is *ultra vires*—an examination into the legislation upon this subject must end in its solution."

From these extracts from the briefs of learned counsel, as well of the appellee as of the appellants, it will be readily seen, we think, that the question for decision depends for its proper determination upon the construction which must be given to the statutory provisions in relation to water-works, in force at the time of the passage of the ordinance by the common council of the city of Vincennes, and of its acceptance by the Vincennes Water Company. The earliest legislation of this

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State in relation to water-works, to which our attention has been directed, is the *twenty-third* clause of section 35 of the general law of June 18th, 1852, for the incorporation of cities, which authorized the common council, by ordinance, "To construct and establish works for furnishing the city with wholesome water, and for that purpose may go beyond the city limits, and exercise full jurisdiction, and all necessary powers therefor." 1 R. S. 1852, p. 211. This clause was re-enacted in the same language, as the 26th clause of section 35 of the act of March 9th, 1857, for the incorporation of cities. 1 G. & H. 225. In the act of December 20th, 1865, for the incorporation of cities, the 26th clause of section 34 conferred upon the common council the power to pass ordinances, "To construct and establish works for furnishing the city with wholesome water, and for that purpose, or for the purpose of drainage of such city may go beyond the city limits, and condemn lands and materials, and exercise full jurisdiction and all necessary power therefor, or the common council may authorize any incorporated company, or association, to construct such works, and in such case the city may become part-stockholder in any such company." Acts 1865, Spec. Sess., p. 17. The clause last quoted was substantially re-enacted as the 26th clause of sec. 53 of the act of March 14th, 1867, for the incorporation of cities, and again in the act of March 10th, 1873, amending said section 53; which said amended section 53 is now section 3106, R. S. 1881.

By an act approved March 11th, 1861, section 1 of the act of May 20th, 1852, for the incorporation of manufacturing and other named companies, was so amended as to authorize "three or more persons" to form an incorporated company, "to supply any city or village with water." This amended section 1 was amended December 27th, 1872, and the latter amended section was also amended by an act which took effect August 24th, 1875, and this last amended section is still in force, and is section 3851, R. S. 1881. In each of these

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amended sections provision was made for the incorporation of companies "to supply any city or village with water."

On the 25th day of March, 1879, an act was approved and became a law, entitled "An act to authorize cities and incorporated towns to construct, maintain and operate water-works; issue and sell bonds to pay for such construction, repealing all laws in conflict with this act, and declaring an emergency." This act is still in force. Sections 3265 to 3285, R. S. 1881. The provisions of the act relate exclusively to the erection, maintenance and operation of water-works by cities and incorporated towns. The act, by its terms, repealed "all laws and parts of laws in conflict with this act." The question for decision is this: Does the act repeal by implication the 26th clause of section 3106, R. S. 1881? The closing sentence of this 26th clause reads as follows: "The common council may authorize any incorporated company or association to construct such works; and, in such case, the city may become part stockholder in any such company or association." If this sentence contained all the power or authority conferred upon a city in relation to water-works, it is clear, we think, that the provision in question would not authorize any city or incorporated town "to construct, maintain and operate water-works." We are of the opinion, therefore, that the above entitled act of March 25th, 1879, does not repeal either in terms, or by implication, the express power conferred upon cities in the closing sentence of the 26th clause of section 3106, R. S. 1881, to authorize by ordinance any incorporated company or association to construct water-works "for furnishing the city with wholesome water." Certainly, there is no express repeal of this power, and repeals by implication are not favored. The repugnancy between the provisions of two statutes must be so clear that they can not be reconciled, before it can be said that the later statute repeals by implication the former law *Longlois v. Longlois*, 48 Ind. 60; *State v. Christman*, 67 Ind. 328; *Chamberlain v. City of Evansville*, 77 Ind. 542.

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Here there is no such repugnancy between the older and the later statute. The power of a city to authorize by ordinance an incorporated company to construct water-works for supplying it with water is widely different from the power conferred by the aforesaid act of March 25th, 1879. Between these two powers there is no inconsistency, or, at least, none which would prevent their co-existence, or require that the conferring, or, rather, enlarging, the later power should repeal, by implication, the power conferred by the older law. Sec. 3851, R. S. 1881, fully authorized, we think, the incorporation of the Vincennes Water Company.

From what we have said, and from the statutory provisions quoted, the conclusion must follow that, under the laws in force at the time, the city of Vincennes had the power, by ordinance, to "authorize private parties to construct, maintain and own the works, and contract with them for the supply of water." Appellee's counsel concede that "whether the city council acted wisely or prudently," in the passage of the ordinance, is not the question for decision in this case; and we have not considered, and express no opinion, on this question. The only question we consider and decide is this, that the action of the common council of the city of Vincennes, in the passage of the ordinance set out in the complaint, was authorized by law, and is not, therefore, *ultra vires* and void. Or, in other words, we decide that the power conferred upon cities by the act of March 25th, 1879, "to construct, maintain and operate water-works," does not expressly or impliedly deprive such cities of their pre-existing and co-existing power and right to "authorize any incorporated company or association to construct such works," for "furnishing the city with wholesome water."

Upon the case as here presented by the briefs of counsel, we are of the opinion that the court erred in overruling the demurrers of the appellants, and each of them, to the appellee's complaint; and for this error the judgment below must be reversed.

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The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the appellants' demurrers to the complaint, and for further proceedings not inconsistent with this opinion.

NIBLACK, J., took no part in the consideration or decision of this case.

No. 8904.

MILLER ET AL. v. SHRINER.

INJUNCTION.—Receiver.—Notice.—Presumption.—Supreme Court.—When the record is silent as to notice of an application in vacation for a temporary injunction and the appointment of a receiver, the Supreme Court, on appeal from an order granting them, will presume that notice was given.

SAME.—Affidavits.—Bill of Exceptions.—Affidavits in support of motions in vacation for a temporary injunction and a receiver are no part of the record unless made so by bill of exceptions.

SAME.—Proceedings to Obtain Injunction.—Complaint.—A temporary injunction can not be granted, save in the case provided for in sec. 137 of the code of 1852 (R. S. 1881, sec. 1148), where the complaint shows no case for it.

From the Union Circuit Court.

J. W. Connaway and *T. D. Evans*, for appellants.

J. E. Tucker and *C. L. Seward*, for appellee.

BLACK, C.—The appellee brought an action against the appellants to recover possession of an undivided portion of certain real estate in Union county. The complaint, which was filed on the 28th of May, 1880, did not ask or show grounds for an injunction or the appointment of a receiver, and was not verified. On the 5th of June thereafter, in vacation, the judge made an order which, after reciting the presentation at that time to him by the appellee of his affidavit in said cause, showing that property, crops, rents and profits of the real estate in controversy were in danger of being lost, removed or mate-

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rially injured, proceeded by enjoining temporarily the defendants, and all persons working under them, from removing or injuring the crops growing on said land until the fifth day of the next term of the circuit court of said county, at which time, it was stated, the cause was set down for trial, and until the final determination of the cause; and a receiver was appointed to take charge of said real estate and of the crops growing thereon, and to collect the rents, etc. On the sixth day of the next term, the 12th of June, appellants moved to dismiss the "temporary restraining order heretofore made in this cause, and dismiss the receiver appointed by the court at chambers in vacation." The court overruled the motion. Appellants also moved to strike out "the affidavit and application for a temporary restraining order and receiver." This motion also was overruled; whereupon, without further proceedings in said cause, appellants brought this appeal, assigning the rulings upon their said motions as errors.

The grounds stated in the former motion, which have been mentioned in argument, were, that appellants had not been served with process or had notice of the application, and that the application did not state facts sufficient to entitle the appellee to the relief granted.

The only reason stated in the second motion, and mentioned in argument, was that the appellants had not been served with process or had notice of the application.

The affidavit mentioned in said order is copied with the transcript brought to this court, but, not being embraced in the bill of exceptions, it can not be regarded as a part of the record.

Whether it was the intention of the appellee to obtain, and of the judge to grant, merely a restraining order or a temporary injunction, the order granted, which is called in the motions of appellants a temporary restraining order, was a temporary injunction.

To grant a temporary injunction, or to appoint a receiver without notice, is error. The record does not show whether there was or was not notice, and it has been held by this court

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that in such case it must be presumed that the judge did not grant the application without proof of notice. *Vance v. Workman*, 8 Blackf. 306; *College Corner, etc., Co. v. Moss*, 77 Ind. 139. The statute provides that in cases in which a receiver may be appointed or refused, the party aggrieved by such appointment or refusal may, within ten days thereafter, appeal to this court without awaiting the final determination of the case. 2 R. S. 1876, p. 115. If this may be regarded as an appeal authorized by the statute, we are required, in view of the manner in which the question is presented, to presume in favor of the action of the court, that the affidavit set forth sufficient grounds for the appointment of a receiver.

Unless it be provided for by statute, it is error to grant a temporary injunction where there is no prayer therefor in the complaint. *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; Story Eq. Pl., section 41. In *College Corner, etc., Co. v. Moss, supra*, it was held that our statute makes no provision for a temporary injunction where no cause therefor is shown in the complaint, original, amended or supplemental, except the provision of section 137 of the Code of 1852, that where it appears during the pendency of the action by affidavit that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property.

The affidavit in this case can not reasonably be presumed to have been such as that contemplated by that provision of the statute, and under the ruling in the case last mentioned the injunction could not properly have been granted solely upon affidavit during the pendency of the action.

For the refusal to dissolve the injunction the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at appellee's costs, and that the cause be remanded, with instructions to dissolve the temporary injunction.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Jones.

No. 9984.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY
COMPANY v. JONES.

RAILROADS.—*Liability for Fires.—Negligence.—Pleading.*—A complaint against a railroad company for setting fire to the plaintiff's fences, etc., averring that the defendant carelessly permitted dry grass to accumulate on its right of way, which was set on fire by sparks from its passing locomotive, that the fire escaped to the plaintiff's lands adjoining, and destroyed his fences and grass, and that the fire and injury were not caused by the fault or neglect of the plaintiff, but wholly by the neglect and carelessness of the defendant, sufficiently shows that the escape of the fire from the locomotive, and its communication to the plaintiff's property, were the result of the defendant's negligence.

SAME.—*Right of Way.—Adjacent Owner.—Possession.—Contributory Negligence.*—The right of way of a railroad company is only an easement, the fee remaining in the owner of the soil, but the railroad company has the exclusive right of possession, so that the owner of the fee has no right to enter and remove combustibles; that the company permits them to accumulate may warrant a finding of negligence by the company, and it is not contributory negligence for the adjacent owner to permit dry grass and stubble on his lands which will spread fires negligently set by the company.

From the Wayne Circuit Court.

W. D. Foulke and J. L. Rupe, for appellant.

NIBLACK, J.—Suit by Levi M. Jones against the Pittsburgh, Cincinnati and St. Louis Railway Company for setting fire to, and causing the destruction of, certain property. The complaint was in two paragraphs. The first charged that the plaintiff was owner of a certain tract of land situate in Wayne county, and upon and adjoining the south side of the defendant's railway; that, on or about the 16th day of August, 1881, the defendant carelessly and negligently permitted long and dry grass to accumulate along and upon the track of said railway, and upon its land adjoining the land of the plaintiff; that said grass was very combustible; that on that day, while the defendant was running and conducting a locomotive along said railway track, where said grass had accumulated, sparks

86	496
124	277
126	233
86	496
133	417

86	496
154	381
154	382
154	383

86	496
161	703

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and fire escaped from said locomotive and set fire to said grass; that the fire communicated to the premises of the plaintiff, and burned, consumed and destroyed two thousand and five hundred rails, which constituted a fence upon the plaintiff's land; that said fire also communicated to the grass upon the plaintiff's meadow situate upon his land, and burned up twelve acres of said meadow grass, and other property of the plaintiff, all of the aggregate value of \$250; that said fire, injury and damage were not, in any manner, caused by the act, fault or neglect of the plaintiff, but wholly by the neglect and carelessness of the defendant.

The second paragraph charged that a second fire was started by the defendant, and communicated to the premises of the plaintiff, on the 15th day of August, 1881, under circumstances substantially similar to those set forth in the first paragraph. Demurrers were severally overruled to both paragraphs of the complaint. Issue, trial by a jury, verdict and judgment for the plaintiff for \$188.

The first question made here is upon sufficiency of the complaint. It is insisted in argument, on behalf of the appellant, that the demurrers ought to have been sustained to both paragraphs, because of their failure to aver—

First. That the fire had been negligently permitted to escape from the locomotive and to ignite the grass.

Second. That the fire was negligently allowed to be communicated to, and to extend over, the premises of the appellee.

The case of the *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111, is cited as sustaining both of these objections to the complaint. The averments in the complaint as to the imputed negligence of the appellant were not made in the usual form, nor in the connection in which such averments are most appropriate in cases like this, but the concluding charge substantially contained in both paragraphs, that the fire, injury and damage complained of in the complaint were caused "wholly by the neglect and carelessness of the defendant,"

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was, in our estimation, sufficient to characterize all the appellant had done and permitted in the premises as having been negligently done and permitted. In that view the demurrers were correctly overruled to both paragraphs of the complaint. It is next insisted that the court erred in overruling the appellant's motion for a new trial, under which some questions upon the sufficiency as well as the admissibility of evidence were reserved.

With their general verdict the jury returned answers to certain interrogatories submitted to them by the court. There seems to have been evidence tending to sustain the general verdict, as well as the answers to interrogatories, and hence, in that respect, we see no error in the refusal of the court to grant a new trial.

At the proper time the appellant moved for judgment in its favor upon the answers to the interrogatories, claiming that those answers were inconsistent with the general verdict; but the court overruled the motion and rendered judgment for the appellee on the general verdict.

Amongst the interrogatories submitted and answered were the following:

"Did the first fire described in the complaint originate on the right of way of the defendant at the point where it passes through the land of the plaintiff? Ans. Yes.

"Did the defendant suffer grass to accumulate where the first fire ignited in a manner which an ordinarily prudent person would not permit under the same circumstances on his own land? Ans. Yes.

"Was such accumulation the proximate cause of damage to the plaintiff by the first fire? Ans. Yes.

"Was not the plaintiff as well acquainted with the condition of the grass upon the defendant's right of way, where it passed through his land, as the defendant was? Ans. Yes."

Similar interrogatories were submitted and answered in the same way as to the second fire described in the complaint.

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It was upon these interrogatories and answers that the claim of the appellant for judgment, in its favor, was based, and it is argued here with much earnestness that the appellant was entitled to judgment upon them.

The theory upon which the argument for the appellant rests is, that, at the point at which the grass was permitted to accumulate, the appellant's possession was a mere easement, the fee remaining in the appellee as the owner of the soil; that as the owner of the soil the grass belonged to the appellee, who had the right to go upon the appellant's right of way and remove it; that as the appellee was as well acquainted with the condition of the grass upon the right of way as the appellant, he was guilty of contributory negligence in not either removing the grass or causing it to be removed.

Rights of way are of different kinds, according to the uses for which they are granted or to which they are applied. Some of them may be used by the owner of the servient estate, in common with others or with the public. Others are necessarily exclusive in their character, and inure only to the benefit of the grantee or his assigns. Of the latter class are rights of way granted to railway companies.

In the case of *Williams v. New Albany, etc., R. R. Co.*, 5 Ind. 111, it was held that a railway company, after having acquired the right of way for its road, is entitled to the exclusive possession of the strip of land over which its right of way extends, and stands to adjoining proprietors in the common relation existing between landed proprietors bordering upon each other. The doctrine there announced seems never to have been since questioned in this court, but rather to have been accepted as a correct exposition of the law applicable to the subject to which it relates. See, also, 1 Thompson Neg. 162.

Allowing combustible material, liable to be set on fire by sparks and cinders thrown from passing locomotives, to accumulate and to remain upon and beside a railway track,

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where there is nothing incombustible between the land of the railway company and the lands of adjoining owners to prevent the spread of fire, comprises a state of facts from which a jury may find negligence on the part of the railway company, and in such a case the failure of an adjoining proprietor to remove dry grass or stubble from his own land to prevent the spread of fire negligently set by the railway company, is not contributory negligence on his part. *Kellogg v. Chicago, etc., R. W. Co.*, 26 Wis. 223 (7 Am. R. 69); *Webb v. Rome, etc., R. R. Co.*, 49 N. Y. 420 (10 Am. R. 389).

It follows that an adjoining proprietor, even though he be the owner of the servient estate, is not guilty of contributory negligence in failing to remove dry grass from the right of way of a railway company, as a precautionary measure against the spread of fire set by a locomotive.

It also follows that the court did not err in refusing to render judgment in favor of the appellant upon the interrogatories and answers set out as above.

The court permitted witnesses introduced by the appellee to answer certain questions, over the objection of the appellant, and the respective decisions of the court permitting those questions to be answered were assigned as causes for a new trial, and have been commented on in argument.

We have carefully considered all that has been said against the propriety of permitting those questions to be answered, and are unable to see that the appellant was injured by any of the answers objected to.

We have made no formal review of any of those questions and answers, because we regard what we have said as practically disposing of all the material questions fairly involved in this appeal.

The judgment is affirmed, with costs.

The State, *ex rel.* Wick, *v.* Slick.

No. 10,717.

THE STATE, EX REL. WICK, *v.* SLICK.

MANDATE.—*Circuit Judge.*—*Bill of Exceptions.*—*Practice.*—Mandate will not be awarded to compel a judge to sign a bill of exceptions, who has not been requested to do so, though his predecessor has wrongfully refused.

SAME.—Where a judge whose term of office is about to expire refuses to sign a proper bill of exceptions presented in apt time, his successor may be promptly applied to by verified petition showing the facts, and it will be his duty to sign and file the bill, though the time limited for its presentation has expired by reason of the refusal of his predecessor—and then, if he refuse, he may be compelled by mandate to do so.

Petition for mandate.

W. B. Hess and *A. C. Capron*, for petitioner.

H. Corbin and *J. D. McLaren*, for defendant.

ELLIOTT, J.—The petition of the relator alleges that on the 37th day of the May term, 1882, of the Marshall Circuit Court, he obtained leave to file a bill of exceptions within one hundred days; that seven days before the expiration of that time the form of a bill was placed in the hands of the attorneys for the adverse party; that the form of the bill was, on the ninety-ninth day of the time granted, presented to the Honorable Sidney Keith, then the judge of the Marshall Circuit Court; that he refused to sign it for the sole reason that the writ of attachment, and the return of the sheriff thereon, were not copied into the bill at full length; the petition avers that the papers named were not copied, but that they were appropriately designated, and that the words "here insert" were written in the bill at the proper place; that the term of office of the judge above named has expired, and that he has been succeeded by the Honorable Jacob S. Slick. The prayer is that a mandate issue commanding the last named judge to sign the bill. It is the duty of a judge to sign a proper bill of exceptions, duly presented within the time allowed, although the proceedings which it recites took place during his predecessor's term of office. *Hedrick v. Hedrick*, 28 Ind. 291; *Smith v. Baugh*, 32 Ind. 163.

It was not necessary that the writ of attachment and re-

86	501
128	288
86	501
139	150
86	501
143	686

The State, *ex rel.* Wick, v. Slick.

turn should have been copied into the bill, for the statute expressly provides that it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words "here insert." The bill presented to Judge Keith was, therefore, a proper one, and it was his duty to have signed it. In refusing to sign it he deprived the petitioner of a legal right, and had a mandate been applied for during Judge Keith's term of office it would have been awarded. We can not, however, award a writ against Judge Slick, for the reason that he has not been requested to act upon the bill. There does not appear to have been any failure or refusal on his part to perform his duty. An officer can not be proceeded against by mandate until there has been a failure or refusal to do what the law requires of him, and in this case Judge Slick has not been asked to sign the bill, and consequently has not had an opportunity of taking any action at all.

It was suggested in argument, that, unless we grant the prayer of the petition, we must hold that parties in cases such as this are without remedy, although they show a clear legal right; but we do not think this follows. One who tenders a proper and just bill within the time allowed, presents it in season to allow a fair examination, and, upon the refusal of the judge to sign it, proceeds with reasonable diligence, will not lose his rights because of the expiration of the term of office of the judge to whom the bill was presented. In such a case the party may, within a reasonable time, present to the successor of the judge to whom the bill was first presented a verified petition showing all the facts, and praying him to sign and seal the bill, and if, after notice and upon a hearing, the party is found entitled to the relief he seeks, it will be the duty of the judge to sign the bill and make it part of the record in such a manner as to make it available on appeal. If the judge to whom such a petition is presented should wrongfully refuse to sign the bill, then, upon a proper showing, mandate would issue commanding him to do it.

Writ refused, at costs of petitioner.

Lowe v. Thompson.

No. 9170.

LOWE v. THOMPSON.

86	508
157	533

PRACTICE.—*Sham Pleadings.*—*Sham Defences.*—*Motion to Reject.*—*Answers to Special Interrogatories.*—Under section 77 of the civil code of 1852, the power of the court to reject sham pleadings only applied to sham defences; but, under section 382, R. S. 1881, the rule is different, and the court may now reject an answer or any other pleading as sham, when it plainly appears upon its face to be false in fact, or is shown to be so by the answers of the party to special written interrogatories, propounded to him to ascertain whether the pleading is false.

ESTOPPEL.—*Receipt for Money.*—*Recital of Payment in Contract.*—The recital in a written contract of copartnership, that each partner had paid so much money as his share of the capital of the firm, is not conclusive, and will not work an estoppel. Such a recital, like an ordinary receipt or acknowledgment of the payment of money, may be explained, controlled, qualified or even contradicted.

From the Shelby Circuit Court.

J. S. Scobey and D. Watts, for appellant.

B. F. Love, H. C. Morrison, T. B. Adams and L. T. Michener, for appellee.

Howk, J.—This was a suit by the appellee against the appellant, Lowe, and Oliver M. Thompson and Daniel W. Lovett as defendants. In his original complaint the appellee alleged in substance, that, on May 11th, 1874, and while the defendants were partners in trade under the firm name of W. W. Lowe & Co., they, by their promissory note, executed by their said firm name, promised to pay to the order of the said Oliver M. Thompson the sum of \$800, in two years after date, negotiable and payable at the Citizens' National Bank of Greensburgh, Indiana, with ten per cent. interest from date, payable annually, compounded if not paid when due, and five per cent. attorneys' fees if suit be instituted thereon; that the payee, Oliver M. Thompson, endorsed and delivered said note, before its maturity, to the appellee, who then owned the same; that the said note was past due and wholly unpaid; that, on May 28th, 1875, the said Lovett withdrew from said firm, at which

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time the appellant and said Oliver M. Thompson, who continued in partnership under the firm of W. W. Lowe & Thompson, agreed in writing to and with the said Lovett, that they would assume all the liabilities of the late firm of W. W. Lowe & Co., and become primarily liable for all the unpaid indebtedness thereof, and release the said Lovett from all liability thereby; that the said Lowe and Thompson continued in business as such partners until February 22d, 1878, at which time they dissolved, and the appellant, Lowe, by his written contract, assumed all the liabilities of said firm; and that, by means of the premises, the appellant and said Oliver M. Thompson, as between them and the said Lovett, were primarily liable for the payment of the note in suit, and the appellant as between him and said Thompson was primarily liable for the payment of said note. Wherefore, etc.

The original complaint was filed on the 3d day of October, 1879; and afterwards, on the 12th day of March, 1880, with leave of the court first had, the appellee filed two additional paragraphs of complaint. In the second paragraph he alleged in substance, that the defendants were indebted to him in the sum of \$800, for four mules sold and delivered by him to the defendants on December 1st, 1874, upon their promise and agreement to pay him the said sum therefor, in twelve months thereafter, which sum was due and unpaid. Wherefore, etc.

In the third paragraph of his complaint the appellee alleged in substance, that the defendants were indebted to him in the sum of \$900 for money loaned to them on October 27th, 1877, and which they agreed to repay him six months thereafter, and that the same was due and unpaid. Wherefore, etc.

The cause was dismissed as to the defendant Daniel W. Lovett, and, having been put at issue as to the other defendants, was tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of \$1,156.80. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on the verdict.

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The following decisions of the circuit court are assigned as errors by the appellant:

1. In overruling his motion for a new trial;
2. In sustaining the demurrer to the sixth paragraph of his answer;
3. In overruling his demurrers to the third, fourth and fifth paragraphs of reply;
4. In overruling his motion to dismiss the suit;
5. In overruling his motion to strike out the second and third paragraphs of complaint;
6. In overruling his motion to dismiss the second and third paragraphs of complaint.

The first point made by the appellant's counsel in argument is the one presented by the fifth alleged error, namely, in overruling his motion to strike out the second and third paragraphs of the complaint. The appellant's motion referred to in the fifth alleged error was in writing, and in substance as follows:

"Comes now the defendant William W. Lowe and moves the court to strike out and reject the plaintiff's additional second and third paragraphs of complaint herein, for the reasons that said paragraphs are sham and dilatory pleas filed herein to secure an undue advantage over this defendant, and, if permitted to remain in the record, great injustice will be done this defendant in giving the plaintiff the opening and close of the argument of said cause, upon such sham and dilatory pleas and pretended issues; and, in verification of this motion, reference is hereby made to the answers of the plaintiff to the interrogatories of this defendant in this cause, made part hereof."

In considering the question presented by this alleged error, it may be premised, that, before the filing of the additional second and third paragraphs of complaint, the appellant separately had answered the original complaint in eight paragraphs; the defendant Oliver M. Thompson had made default; and the action had been dismissed as to the defendant

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Daniel W. Lovett. The additional paragraphs of complaint, however, were filed against all the original defendants. The appellant separately answered the additional second and third paragraphs of complaint by a general denial thereof, and with his answer he filed two interrogatories to be answered under oath by the appellee. The appellee's answer, under his oath, to these interrogatories showed very clearly, as it seems to us, that he had no such cause of action against the defendants, or either of them, as he had stated in either the second or third paragraphs of his complaint. It may be conceded that these two paragraphs of appellee's complaint were shown, by his sworn answers to the appellant's interrogatories, to be false in fact and sham pleadings; but it does not follow that the court erred in overruling the appellant's motion to strike out and reject these paragraphs on that ground. Manifestly, the motion was made, or intended to be made, under the provisions of section 77 of the civil code of 1852, in force during the pendency of this cause in the trial court. This section provided as follows:

"Sec. 77. All frivolous demurrers and motions shall be overruled; all sham defences shall be rejected; all surplusage, tautology, and irrelevant matter shall be set aside, when pointed out by the party aggrieved." 2 R. S. 1876, p. 72.

This was the only section in the code of 1852 which authorized the trial courts to reject sham pleadings of any kind; and by the express terms of the section the authority thereby conferred was limited to the rejection of "sham defences." It is very clear, therefore, that the appellant's motion to reject the second and third paragraphs of appellee's complaint, as sham pleadings, was not authorized by the civil code of 1852, and that the overruling of this motion was not an available error for the reversal of the judgment. In this connection we may properly remark; however, that the trial courts are now authorized by section 847 of the civil code of 1881 (sec. 382, R. S. 1881), to reject "An answer or other pleading," as sham, either when it plainly appears upon its face to be false

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in fact, and intended merely for delay, or when shown to be so by the answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false. *Beeson v. McConnaha*, 12 Ind. 420.

The next error complained of in argument by the appellant's counsel is the decision of the trial court in overruling the motion to dismiss this action as to the appellant, for the reason that since the beginning of the suit, and during its pendency, to wit, on the 13th day of November, 1879, the appellee had dismissed the action as to the defendant Daniel W. Lovett; to which decision the appellant at the time excepted, and filed his bill of exceptions. In the same connection the appellant's counsel also complain, in argument, of the alleged error of the court in overruling the appellant's motion to dismiss this action as to the second and third paragraphs of appellee's complaint, for the reason that those paragraphs had been filed long after the appellee's dismissal of the action as to Daniel W. Lovett, the action having been prosecuted prior to such dismissal, against the original defendants, Lowe, Thompson and Lovett. In his brief of this cause the appellant's counsel say that the appellee, "having voluntarily at a previous term dismissed his suit as to the defendant Lovett, can not carry on the prosecution as to the remaining two makers of the note; and again, having begun a suit on a note made by three parties and the three made defendants, he can not, in that suit, after dismissal as to one, file two new paragraphs on the common counts against the two remaining defendants."

It is clear, we think, that the first of the two errors now under consideration is not well assigned. The fact, that the appellee had voluntarily dismissed his original action as to the defendant Lovett, certainly afforded no sufficient ground for dismissing that action as to the other two defendants, or either of them; and that was the only ground stated in the appellant's motion for such dismissal as to himself. If the appellee's dismissal of the action as to the defendant Lovett preju-

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diced or injured the appellant in any manner in his defence to the action, he should have shown the fact to the court at the time, and objected and excepted to such dismissal. Not having done so, but having suffered the appellee to dismiss his action as to Lovett, without any objection thereto, the appellant could not afterwards make the fact of such dismissal the ground of his motion to dismiss the action as against himself. Besides, it will be seen from the summary we have given of the original complaint, that it states a cause of action, in appellee's favor, against the appellant and his co-defendant, Thompson, the two remaining defendants after the dismissal as to Lovett; for it counts upon the written contract of the appellant and Thompson with Lovett, whereby they agreed with him that they would assume all the liabilities of the late firm of W. W. Lowe & Co., and become primarily liable for all the unpaid indebtedness thereof. The appellee was not a party to this written contract, but he was a creditor of the firm of W. W. Lowe & Co., and as such he had the right to sue upon such contract. We are of the opinion, therefore, that the court did not err in overruling the appellant's motion to dismiss the original action as to him. Nor do we think that the court erred in overruling his motion to dismiss the action as to the second and third paragraphs of the complaint. The fact that these paragraphs were filed long after the dismissal of the original action as to Lovett, afforded no sufficient ground for the dismissal of the action as to those paragraphs, and that is the only ground stated in the motion.

The appellant's counsel also complain of the decision of the court as erroneous, in sustaining a demurrer to the sixth paragraph of the appellant's answer. In this paragraph the appellant alleged, in substance, that in 1874 he and Oliver M. Thompson and Daniel W. Lovett formed a copartnership for the purpose of dealing in stone; that it was understood and agreed by and between the members of the firm, that each of them was to contribute to the capital stock of the firm, as his share thereof, the sum of \$7,000; that the appellant and said

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Lovett each contributed the sum of \$7,000 to such capital stock; that the said Thompson only contributed, of his share of such capital stock, the sum of \$5,600, and no more; that, on the 11th day of May, 1874, and while the said Thompson was indebted to said firm in the sum of \$1,400, he sold and delivered to the firm four mules, of the value and at the agreed price of \$800, as a further payment upon his share of the capital stock of the firm; that upon said date the firm executed the note in suit to said Oliver M. Thompson, with no intention that the same should be paid, but as an evidence that the firm would recognize the claim of said Thompson for that sum, the consideration of which was said mules; that the note was to be treated as a memorandum merely of the credit to which said Thompson was entitled upon his share of the firm's capital stock; that the said note was assigned and transferred to the appellee after the same, by its terms, became due. Wherefore the appellant said, that the appellee should not recover on said note.

This paragraph of answer was addressed to the original complaint, and was filed some time before the filing of the second and third paragraphs of complaint. It was demurred to upon the ground that it did not state facts sufficient to constitute a defence; the demurrer was sustained, and the appellant excepted. It is said by appellee's counsel, in their brief of this cause, that the trial court sustained the demurrer to this paragraph of answer "on the ground that it set up facts attempting to vary, contradict and alter the effect of the note in suit by a contemporaneous oral agreement that the note should not be paid, but should be treated as a memorandum merely of the credit to which O. M. Thompson was entitled, on a sale of mules to the partnership." Whether or not this was a proper ground for the decision, it seems to us that the paragraph of answer was bad, on the demurrer thereto, on other grounds. It was not good as an answer setting up the want or the failure of the consideration of the note in suit; because it alleged that the consideration of the note was the

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sale and delivery, by the payee to the makers of the note, of four mules, of the value and at the agreed price of \$800, the amount of such note. The paragraph can not be regarded as stating a good set-off, because the unpaid balance of Oliver M. Thompson's share of the capital stock of the late firm of W. W. Lowe & Co., if due at all from Thompson, was due to all the members of the firm, and not to the appellant individually; but it was not alleged to be due to any one or even unpaid. *Parks v. Zeek*, 53 Ind. 221. So that the court did not err, we think, in sustaining the demurrer to the sixth paragraph of answer.

The next error complained of by appellant's counsel is the decision of the court in overruling appellant's demurrer to the fifth paragraph of reply to the seventh paragraph of his answer. In this paragraph of reply the appellee alleged in substance, that the appellant was estopped to aver that said Oliver M. Thompson did not pay his full proportionate share, \$7,000, of the capital stock of the old firm of W. W. Lowe & Co. at the time of the formation of the partnership; because the plaintiff said that when the firm was organized, and as a part of its organization, the members of the firm, of whom the appellant was one, by their written contract of copartnership, a copy of which was made part of said reply, stipulated, recited and agreed that each of them had contributed \$7,000 to the capital of the firm, to be used and employed in common between them, for the support and management of the business of the firm, to their mutual benefit. Wherefore, etc.

This paragraph of reply was bad. An ordinary receipt or acknowledgment of the payment of money—and it was nothing more in this case—in such a contract, will not work an estoppel. It may always be explained, controlled, qualified or even contradicted. *Pauley v. Weisart*, 59 Ind. 241; *Beedle v. State, ex rel.*, 62 Ind. 26; *Lash v. Rendell*, 72 Ind. 475. The court erred, we think, in overruling the appellant's demurrer to the fifth paragraph of reply; and for this error the judgment below must be reversed.

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The other matters complained of by appellant's counsel arise under the alleged error of the court in overruling the motion for a new trial, and need not now be considered.

The motion of Oliver M. Thompson to strike out his name as an appellant, filed in this court on the 27th day of September, 1881, is sustained.

The judgment against the appellant, Lowe, is reversed, at appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the fifth paragraph of reply, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

No. 9738.

COSGROVE ET AL. v. COSBY.

BILL OF EXCEPTIONS.—Evidence.—Omission.—Supreme Court.—Verdict.—A bill of exceptions, purporting to contain all the evidence, which omits documents which it states were in evidence, and does not designate them for insertion as the statute, R. S. 1881, section 626, requires, is not sufficient to present to the Supreme Court the question whether the verdict or finding was supported by sufficient evidence.

SAME.—Exception.—Record.—An exception to the admission of evidence, the record failing to show what objection was stated, is not available in the Supreme Court.

BANKRUPTCY.—Set-Off.—Judgment.—The discharge in bankruptcy of one of two joint judgment debtors transforms the debt in equity into a several one against the other, so that an assignee may make it a set-off against a judgment held by the other against him, and thus obtain satisfaction of the latter judgment.

SET-OFF.—Equity.—Whenever it is necessary to effect a clear equity or avoid irremediable injustice, set-off will be allowed though the debts be not mutual.

From the Daviess Circuit Court.

J. W. Burton, for appellants.

W. D. Bynum and *A. T. Beck*, for appellee.

BICKNELL, C. C.—This was a motion to offset judgments ;

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it was commenced before a justice of the peace and appealed to the circuit court. In the circuit court it became, by amendment, a complaint by James Cosby against James Cosgrove, Hagerman Tripp, Francis A. Brougher, John A. Craig, Jonathan Jones and Hiram Hyatt. It alleged that, on January 15th, 1878, Tripp, Brougher, Craig and Jones recovered a judgment against James Cosgrove and William Trantor for \$250.04, and, on April 29th, 1880, assigned \$60 thereof to the plaintiff; that, in 1878, said William Trantor was duly adjudged to be a bankrupt; that, on December 12th, 1879, said Cosgrove recovered a judgment against the plaintiff for \$56.43. Tripp, Brougher, Craig and Jones were made defendants to answer as to their interests; Hyatt was made a defendant on his own petition.

The complaint prayed that the judgment against Cosgrove and Trantor, to the extent of the \$60 thereof thus assigned to the plaintiff, should be offset against said judgment held by Cosgrove against the plaintiff for \$56.43. A demurrer to this complaint, for want of facts, was overruled. The defendants Tripp, Brougher, Craig and Jones answered that they had no longer any interest in that part of the judgment by them assigned as aforesaid. The defendant Cosgrove answered in denial. The defendant Hyatt filed a cross complaint, claiming that he owned said judgment in favor of Cosgrove against the plaintiff, by purchase from Cosgrove before the plaintiff took his partial assignment of the judgment against Cosgrove and Trantor, and before the commencement of this suit.

The plaintiff answered this cross complaint by a denial; the defendant Cosgrove answered the same, admitting the facts alleged therein. The issues were tried by the court, who found that, on January 15th, 1878, Tripp and others recovered a judgment against Cosgrove and Trantor for \$256.04, and, on April 29th, 1880, assigned \$60 of it to Cosby; that, on December 12th, 1879, Cosgrove recovered a judgment against Cosby for \$56.43, and, on May 1st, 1880, assigned it to Hyatt,

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and that said judgment is subject to be offset against that part of the judgment against Cosgrove and Trantor assigned to Cosby as aforesaid.

The court rendered judgment on the finding, and that said judgment for \$56.43 be declared satisfied, and that the portion of the judgment assigned to said Cosby be credited as of December 12th, 1879, with the sum of \$56.43, and that the plaintiff recover of Cosgrove his costs. There was no exception taken to this judgment, and no motion was made to modify it.

The defendants Cosgrove and Hyatt moved for a new trial, alleging the following reasons:

1. The finding and decision are not sustained by sufficient evidence.

2. The finding and decision are contrary to law.

3. Error of the court on the trial in admitting in evidence the judgment of Tripp and others against Cosgrove and Trantor, and in admitting in evidence the assignment of \$60 thereof to the plaintiff.

This motion was overruled. Cosgrove and Hyatt appealed from the judgment. The errors assigned are overruling the demurrer to the complaint, and overruling the motion for a new trial.

As to the motion for a new trial the appellee claims that no question is presented thereby, because there is no proper bill of exceptions. There is a paper purporting to be a bill of exceptions, which is signed by the judge, and contains the statement, "This was all the evidence given in the cause;" but it shows that documentary evidence was given which is not in the alleged bill, and for which no place is designated by the judge. Upon this subject the following is the language of the court in *Irwin v. Smith*, 72 Ind. 482, 489: "In *Mills v. Simmonds*, 10 Ind. 464, it is held that, under the practice prevailing" formerly, "the instruments could only be made

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part of the record by being copied into the bill. The code provides a more liberal rule, but it does not relax the old rule any farther than to allow instruments to be copied into the record by the clerk in cases where they are properly referred to, and the proper place for their insertion designated by the words 'here insert.' The right to have instruments embodied in the bill without being actually copied therein, before the bill is signed, depends entirely upon this statutory provision. If it were not for this provision, they could be brought into the record" by bill of exceptions "only by being copied at full length into the bill before the signature of the judge was affixed. The statute expressly provides the method in which instruments may be carried into the record without being actually copied, and we have no authority to declare that it may be done in any other. There is no room for construction, for the language of the statute is plain. The instrument must either be copied, or it must be designated, and the place for its insertion indicated by the words 'here insert.'" In the subsequent case of *Clay v. Clark*, 76 Ind. 161, the preceding case was cited as authority, and the court said: "In order that written instruments shall constitute a part of the bill of exceptions, they must either be copied into it at full length, before it is signed by the judge, or appropriately referred to, and the proper place for insertion designated by the words 'here insert.'"

In the case at bar the alleged bill of exceptions states that certain instruments were read in evidence, but they are not copied in the alleged bill, nor are they referred to with a place of insertion designated, as the code requires. The instruments referred to were judgments. They are not written instruments within the meaning of the statute requiring copies of written instruments to be set out. *Lytle v. Lytle*, 37 Ind. 281. Therefore, they constituted no part of the complaint. *Excelsior, etc., Co. v. Brown*, 38 Ind. 384.

There being no proper bill of exceptions, the questions pre-

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sented by the motion for a new trial are not properly before us. *Sidener v. Davis*, 69 Ind. 336, 342. Even if the bill of exceptions were right, no notice could be taken of the alleged error in admitting in evidence the judgment of *Tripp and others v. Cosgrove and Trantor*, because, although an objection is shown to the admission of said judgment, yet no reasons for such objection are stated. *Fisher v. Allison*, 46 Ind. 593. There was no error in overruling the demurrer to the complaint. *Brooks v. Harris*, 41 Ind. 390; *Hill v. Brinkley*, 10 Ind. 102; *McAllister v. Willey*, 60 Ind. 195.

It alleged that Trantor had been declared a bankrupt, and that no execution could issue against his property. The judgment, therefore, against Cosgrove and Trantor had become substantially the debt of Cosgrove alone. He only was bound to pay the whole of it, and that part of it assigned to Cosby was a proper subject of equitable set-off against the judgment held by Cosgrove against Cosby.

“Whenever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed, though the debts are not mutual. * * * In cases of insolvency, or of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious, and the set-off will be allowed.” *Brewer v. Norcross*, 17 N. J. Eq. 219. The authority of this case was recognized by this court in *Carter v. Compton*, 79 Ind. 37. See also, *Keightley v. Walls*, 27 Ind. 384; *Lindsay v. Jackson*, 2 Paige, 581. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

Brann *et ux.* v. Campbell *et ux.*

No. 9863.

BRANN ET UX. v. CAMPBELL ET UX.

WITNESS.—Character.—A witness whose testimony has been contradicted, but who has not been impeached, can not be supported by proof of good character for veracity.

From the Rush Circuit Court.

J. Q. Thomas, J. J. Spann, G. H. Punttenney, A. B. Irvin and J. Helm, Jr., for appellants.

F. J. Hall, J. W. Study, W. A. Cullen and B. L. Smith, for appellees.

FRANKLIN, C.—Campbell and wife sued Brann and wife in an action of slander. The defendants answered by averring the truth of the words charged, in justification. The plaintiffs replied by a denial. There was a trial by a jury, and a verdict for the plaintiffs. A motion for a new trial was overruled, and judgment rendered for the plaintiffs.

The defendants appealed to this court, and have assigned a large number of errors, among which is the overruling of the motion for a new trial, which states various reasons therefor, which have also been improperly assigned as specifications of error; but we deem it unnecessary to copy them in this opinion. Among the reasons stated for a new trial is the following: That the court erred in permitting the plaintiffs to introduce witnesses and prove the general good character for truth and veracity of the plaintiffs' impeaching witnesses, whose general character had not been attacked otherwise than by the denial by the impeached witnesses of the statements testified to by the impeaching witnesses. This was irregular and erroneous.

A witness's general character is presumed to be good until it has been attacked. Contradictions merely do not amount to an attack upon general character, and do not afford any ground for the admission of evidence of general character. 1 Greenleaf Ev., section 469, and authorities cited.

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In the case of *Pruitt v. Cox*, 21 Ind. 15, the following language is used: "If, in the multiplicity of contradictions daily occurring, each witness was permitted to bring in other witnesses to sustain his general character—and they, contradicting each other, should be permitted to bring in others, the whole time of our courts would be taken up in hearing these side questions, until the matters originally in litigation would be almost lost sight of, to the great detriment of suitors." The court held such practice to be erroneous, and for that and other reasons the judgment was reversed.

In the case of *Johnson v. State*, 21 Ind. 329, the court permitted the State to introduce several witnesses to testify as to the "standing for integrity" of one of the State's witnesses, and this court said: "We are of opinion that the court erred in admitting the evidence. Proof of the witness' 'standing for integrity' was only an indirect mode of proving his general moral character. * The character of the witness not having been impeached, it was incompetent to support him by evidence of his general moral character, or that which is equivalent to such evidence." And the case of *Rogers v. Moore*, 10 Conn. 13, is referred to in support thereof. And for the error of admitting such testimony the judgment was reversed.

In the case of *Presser v. State*, 77 Ind. 274, testimony to prove the good character of a witness, whose testimony had been contradicted by other witnesses, was refused. This court held that such ruling was right, and used the following language: "It is well settled that a witness who is contradicted by evidence disproving the matters of fact testified to by him can not call witnesses to prove good character." The judgment was affirmed.

It has been thus established by this court, that a witness whose general character has not been impeached, and whose testimony has only been contradicted by other witnesses, can not introduce witnesses to prove his general good character, and that the introduction of such testimony is good cause for reversing the judgment. Such testimony not only tends to

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unnecessarily consume and delay the time of the court, and unlimitedly extend the raising and investigating of collateral issues, but may tend to give additional weight and undue influence to the testimony of such witnesses whose characters have thus been proven to be positively good, over and above the same testimony, by the same witnesses, under the legal presumption of good character. And we can not say in this case that such testimony did not harm the appellants.

The court erred in admitting such testimony, for which error a new trial ought to have been granted.

There are a number of other questions presented and discussed by counsel, but as they may not arise upon a subsequent trial of the cause, we deem it unnecessary to consider and decide them.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at the costs of the appellees, and that the cause be remanded, with instructions to the court below to sustain appellants' motion for a new trial, and for further proceedings.

No. 9952.

INGEL v. SCOTT.

REPLEVIN.—*Joint Ownership.*—*Complaint.*—*Demurrer.*—Where the plaintiff sues to recover the possession of a specific share and certain quantity of wheat, of which he alleges that he is the owner and entitled to the possession, and that defendant has possession thereof without right, and unlawfully detains the same from the plaintiff, the complaint is sufficient to withstand a demurrer thereto for the want of facts. The joint ownership of the wheat by the plaintiff and defendant, if it exists, is not apparent on the face of the complaint, and is matter of defence to be shown by the answer.

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SUPREME COURT.—Judgment.—Objections to Form or Substance.—Where no objections are made, nor exceptions taken, either to the form or substance of the judgment in the circuit court, they can not be made or taken for the first time in the Supreme Court.

SAME.—Evidence.—Testimony.—Bill of Exceptions.—Unless the bill of exceptions affirmatively shows that it contains all the evidence given on the trial, the Supreme Court will not consider the question whether or not the finding of the court is sustained by sufficient evidence. In such a case, the word "testimony" is not the equivalent of the word "evidence."

From the Miami Circuit Court.

C. M. Emerick and W. E. Mowbray, for appellant.

H. J. Shirk, J. Mitchell, — Reasoner and — *Loveland*, for appellee.

Howk, J.—This was a suit by the appellee against the appellant to recover the possession of certain personal property, and damages for its detention. The cause was put at issue and tried by the court, and a finding was made for the appellee, that she was the owner of and entitled to the property described in her complaint; that the same was of the value of \$147; that the same was unlawfully detained by the appellant in Miami county, and that the appellee had been damaged in the sum of one cent. Over the appellant's motion for a new trial the court rendered judgment for the appellee and against the appellant, upon and in accordance with its finding.

In this court the appellant has assigned the following errors:

1. The court erred in overruling his demurrer to appellee's complaint;

2. The court erred in finding a judgment for the appellee and against the appellant, on the evidence and admissions contained in the bill of exceptions; and,

3. The court erred in overruling his motion for a new trial.

In her complaint the appellee alleged in substance, that she was the owner and entitled to the possession of two-fifths of the wheat crop raised by the appellant on the lands, in Washington township, Miami county, Indiana, rented by him of

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the appellee, and known as the Walker farm; that said two-fifths amount to 140 bushels of wheat, and was of the value of \$147; that the appellant had the possession of said wheat without right, and unlawfully detained the same from the appellee, in Miami county; that, before the commencement of this suit, the appellee demanded of the appellant the possession of said wheat, but he refused to deliver it or any part thereof to her; that the same had not been taken for any tax, assessment or fine, nor seized under an execution against the property of the appellee. Wherefore, etc.

The only objection to the sufficiency of the complaint pointed out by the appellant's counsel is thus stated: That appellee and appellant were joint owners of the crop of wheat, and that, therefore, neither one could maintain an action against the other for the possession of the wheat. The fact of a joint ownership of the wheat, if such fact existed, was not apparent on the face of the complaint. The appellee did not sue for an undivided interest in wheat, but for a specific share and quantity of wheat. The complaint on its face stated facts sufficient to constitute a cause of action; and if any facts existed which would prevent a recovery, they were not apparent and were proper matters of defence. *Schenck v. Long*, 67 Ind. 579.

It is objected to the judgment, in this court, that it did not follow the finding of the trial court, and that it was erroneously rendered to be executed without relief from valuation laws. No objections were made nor exceptions taken below, either to the form or substance of the judgment; and it is well settled that they can not be made or taken, for the first time, in this court. *Smith v. Tatman*, 71 Ind. 171; *Teal v. Spangler*, 72 Ind. 380.

The only question intended to be presented for decision by the alleged error of the court in overruling the motion for a new trial is this: Is the finding of the trial court sustained by sufficient legal evidence? We do not think that the bill of exceptions shows that it contained all the evidence given on the trial. The bill begins with the statement that "the

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following was all the testimony and all the admissions made by the plaintiff as well as the defendant ;” and this was the only statement in the bill tending even to show that it contained all the evidence given on the trial. This was not sufficient. It is settled by the decisions of this court that “testimony” is not the proper word to be used in a bill of exceptions for the purpose of indicating that it contained all the evidence given on the trial. Testimony is merely one species or kind of evidence ; and, while evidence includes all testimony, it can not be said that testimony includes all evidence. *McDonald v. Elfes*, 61 Ind. 279 ; *Sessengut v. Posey*, 67 Ind. 408 (33 Am. R. 98).

We have found no error in the record which would authorize the reversal of the judgment.

The judgment is affirmed, with costs.

 No. 9100.

DEBOLT v. DEBOLT ET AL.

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REVIEW OF JUDGMENT.—*New Matter.*—*Diligence.*—*Complaint.*—*Married Women.*—A complaint for review of a judgment for newly-discovered matter, under section 617, R. S. 1881, must show, not merely by averring in the language of the statute, but by facts alleged, that the new matter could not, by reasonably active diligence, have been discovered before the rendition of the judgment. This rule applies to married women as well as to others.

From the Randolph Circuit Court.

W. A. Bickle, for appellant.

W. A. Thompson, A. O. Marsh and *J. W. Thompson*, for appellees.

BLACK, C.—This was a suit brought by the appellant, *Malinda Debolt*, against the appellees, *William P. Debolt*, hus-

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band of said Malinda, Ralph A. Cooper and James Moorman, to review a judgment "for material new matter discovered since the rendition thereof."

The facts were stated in the complaint, in substance, as follows: On the 31st of May, 1875, the appellee William P. Debolt executed his promissory note to the appellee Cooper for \$6,655, payable one year after date, and, for the purpose of securing the payment of said note, agreed with said Cooper to execute to him a mortgage on certain real estate owned by said William, being certain lands in Randolph county and certain lots in the town of Union in said county; and the complaint alleged that said William P. Debolt, well knowing that appellant had steadily and peremptorily refused to sell, mortgage or in any manner incumber said lots in the town of Union, upon which her home was located, wrongfully, deceitfully, unlawfully and fraudulently, on the 21st of July, 1875, brought said mortgage to her for her signature; that he so read it to her as to omit any description of said lots, and, in answer to her question, informed her most solemnly that the mortgage only included the real estate therein described other than said lots; that, having confidence in her husband, and relying on said statement, she was misled and fraudulently imposed upon by him as to the contents of said mortgage, and signed it, and, without any acknowledgment of her signature to or before any officer authorized to take the same, her husband took the mortgage away with him; that further to deceive and mislead her and defraud her into signing, the officer whose certificate of acknowledgment to said mortgage appears thereon was not in the room, and did not see her sign, nor did she afterward acknowledge her signature to him, but said officer was brought into another room, and there remained until said mortgage was handed to him by appellant's husband; that she, being ignorant of legal consequences, was compelled to rely on others for information and direction with reference thereto, and, her husband being himself a lawyer, she supposed he knew and would not mislead

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her ; that more certainly to deceive and mislead her into signing a mortgage on said lots, her husband, instead of procuring a competent notary public of Union City to take said acknowledgment, procured a justice from the country, who, from collusion with appellees or ignorance of his duties, certified to appellant's signature and acknowledgment without witnessing the signature or asking her to acknowledge the same ; that she first learned that said lots were included in the mortgage about the latter part of February or the first of March, 1877 ; that when said mortgage was signed by her, the only description of said lots in it was as follows : " Lots 290, 291, 306, 310 " ; that, some two weeks after she had signed it, and it had passed out of her hands, she never having seen it or had possession of it in the meantime, one or the other of the appellees inserted in writing, by interlineation, immediately following said description of said lots, the words, " in the town of Union in said county of Randolph, as numbered, known and designated on the recorded plat of said town," without her knowledge, consent or approval, and without any re-signing or re-acknowledgment thereof by her ; that she learned this fact about the 10th of July, 1878 ; that, on the 13th of December, 1876, said Cooper, by his complaint filed in the clerk's office of the Randolph Circuit Court, upon which summons was issued to the sheriff of said county, commenced suit against the appellee William P. Debolt and the appellant, to obtain a judgment on said note and the foreclosure of said mortgage ; that said summons was served on appellant on the 15th day of December, 1876, ten days before the first day of the December term, 1876, of said court ; that during said term appellant's said husband, without consulting her, and without her knowledge, consent or authority, caused an answer to be by her filed to said complaint, jointly with himself ; that said Cooper, during the same term, on the 27th of December, filed his reply, putting said cause at issue ; that on the same day appellant's said husband and his counsel withdrew said answer, whereupon a default was taken against

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appellant in said cause, and a decree was entered ordering the sale of said lots, together with the other real estate mentioned in said mortgage; that an order issued under said decree to the sheriff of said county, and a sale of said real estate was made for \$6,967.96 to the appellee James Moorman, who, in virtue of said sale, holds possession of the same; that appellant, believing and understanding that said mortgage only covered and included the tracts of farming land as read and represented to her when she signed it, did not intend to appear to or in said action, and did not, until long after judgment, know that any appearance had been made for her; that said words were added to the description of said lots by her said husband or said Cooper, or by their procurement, without her knowledge or consent, fraudulently, corruptly and designedly to cheat her out of her rights and interest in said property; that the foregoing facts are true, and had appellant known them when said cause was pending, she would by proof have abundantly shown them. She therefore says that the mortgage was procured from her by fraud and deceit, and that it was and is a forgery, which she can abundantly show. Prayer for a review of said judgment, etc.

The complaint was verified, and a transcript of the judgment, the review of which was sought, was filed with it.

Separate demurrers to the complaint filed by appellees Cooper and Moorman were sustained; and the only question before us is that of the sufficiency of the complaint thus raised.

Section 588 of the code of 1852 provided, as does section 617, R. S. 1881, that a complaint for review of a judgment for new matter discovered since the rendition thereof shall be verified by the complainant, and show that the new matter could not have been discovered before judgment by reasonable diligence, and that the complaint is filed without delay after the discovery.

It has been held by this court that the complaint in such case must show by facts therein alleged, and not by mere aver-

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ment, in the words of the statute, that the new matter could not have been discovered by reasonable diligence before the rendition of the judgment, and that the complaint is filed without delay after the discovery of the new matter. *Barnes v. Dewey*, 58 Ind. 418 ; *State, ex rel., v. Holmes*, 69 Ind. 577 ; *Gregg v. Loudon*, 51 Ind. 585. The new matter must be such as the party, "by the use of a reasonably active diligence, could not have known." *Jenkins v. Prewitt*, 7 Blackf. 329.

Appellant was a married woman at the time of the rendition of the judgment, the review of which is sought, and her coverture still continued at the commencement of this suit.

Section 586 of the code of 1852 provided that a complaint for review might be filed at any time within three years next after the rendition of the judgment, and that any person under legal disability might file such complaint at any time within three years after the disability was removed. Where the complaint for review was filed for error of law appearing in the proceedings and judgment, the provision of said section 586, in favor of a person under disability, was certainly applicable without qualification. See *Harlen v. Watson*, 63 Ind. 143.

In *Alexander v. Daugherty*, 69 Ind. 388, 395, it was said by BIDDLE, J., that said section 586 was "modified and controlled, as to the time within which the complaint may be filed, when it is founded on matter discovered since the rendition of the judgment, by section 588, which requires such complaint to show that it was filed 'without delay after the discovery' of such material new matter."

The provision in favor of parties under disabilities relates to the time of filing the complaint for review ; but the complaint, based upon the discovery of new matter, whenever filed must be verified by the complainant, and show that the new matter could not have been discovered before judgment by reasonable diligence. *Comer v. Himes*, 49 Ind. 482.

A married woman, duly notified of the pendency of an action against her, is not relieved by her coverture from the necessity of setting up any defence which she may have, and

Debolt v. Debolt *et al.*

which, by such reasonable diligence as is required of a person not under disability, she may be able to establish.

Appellant claimed in her complaint to have discovered since the rendition of the judgment the fact that said lots were included in the mortgage, and the fact that additional words of description of said lots were written in the mortgage after she signed it.

She was duly notified of the institution of the suit to foreclose the mortgage. So far as appears, she took no measures whatever to inform herself in regard to the proceedings, and gave no one authority to look after her interests in connection with the suit. She must be regarded as chargeable with whatever information she might have obtained from the papers, proceedings and evidence in the action. Otherwise, there might be no end of litigation, and no repose of titles acquired under judicial proceedings. Of course, slight enquiry would have resulted in information as to the real estate involved in the foreclosure suit.

There is no allegation that appellant, who was able to sign the mortgage, was unable to read its contents, or that she was prevented from so doing. It may be inferred from the allegations of the complaint, that she might have read it, but that she took the word of her co-mortgagor as to its contents, and, in the absence of the mortgagee and without being influenced by him, signed without reading. She must be held chargeable, then and thereafter, with knowledge of what she signed, as to those who, for value and without fraud (which can not be presumed), acquired rights through her signature and the foreclosure of said mortgage. It is not alleged how or from whom she discovered the new matter. If, knowing the contents of the mortgage as signed by her, she had obtained information of the purport of the pleadings and their exhibits, and the evidence in the foreclosure suit, she might, perhaps, have discovered the fact of the alteration of the mortgage. At all events, in the absence of any allegation as to the manner in which the discoveries were made, it may be that such

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diligent attention to the foreclosure suit as was reasonable, in consideration of the rights of others to be acquired thereunder, would have resulted in information not only that the lots were included in the mortgage, but also that the mortgage had been altered by interlineation, as alleged.

If we knew the means by which appellant's information was received, it might be that it could be said that, by reasonable diligence, she could have received the same information through the same means before the rendition of the judgment.

Instead of showing any diligence before judgment, the complaint shows the absence of diligence, without sufficient excuse, as against appellees Cooper and Moorman.

As we think the complaint fails to show that the new matter could not have been discovered before judgment by reasonable diligence, it is unnecessary to enquire whether, if the complaint were good in this regard, it shows a cause of action against appellee Moorman, the purchaser under the foreclosure sale, or whether he is a proper party to a suit to review the foreclosure decree.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at appellant's costs.

No. 9482.

MILLER v. NOBLE ET AL.

SHERIFF'S SALE.—*Title*.—A purchaser at a sheriff's sale, as a general rule, acquires only the estate which the debtor possessed.

PARTITION.—*Adjudication of Title*.—Title may be put in issue, tried and settled in partition proceedings; but, ordinarily, such proceedings do not settle title, do not create any new title, but simply divide into separate shares the land held under existing titles. If an adjudication upon the character of the title is desired, issues must be formed directly presenting that question for decision.

SAME.—*Descents*.—*Widow*.—*Sheriff's Sale*.—*Case Criticised*.—A widow mar-

86	527
125	114
125	187
127	36

86	527
125	426

86	527
146	9
146	403

86	527
148	393
148	394
148	396
149	477
149	485
152	261

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ried a second time, having children by her first husband. The real estate which came to her from the first husband was, during her second coverture, sold at sheriff's sale to satisfy a judgment recovered against her, after her second marriage. The purchaser, after obtaining a sheriff's deed, brought an ordinary suit for partition against her and her children by the first marriage; no question of title was sought to be settled by the complaint, nor made by the pleadings, and the decree merely granted partition. Action by said children, after their mother's death, to recover the land so set off to said purchaser.

Held, that the purchaser from the sheriff took merely the estate of the judgment debtor, which, under the statute, was an estate in fee simple determinable upon her death during the second coverture.

Held, also, that the partition proceedings did not enlarge this estate. *Crane v. Kimmer*, 77 Ind. 215, criticised.

Held, also, that, on the death of the woman, the land went to her children by the first marriage.

From the Madison Circuit Court.

W. R. Pierse and *C. B. Gerard*, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellees.

ELLIOTT, J.—The land which is here the subject of dispute is claimed by the parties through John A. Noble, deceased; the appellees claim as his children; the appellant founds his claim on a sheriff's sale made on a judgment obtained by him against the widow of John A. Noble. At the time the judgment was recovered and sale made, the widow had married a second time.

A purchaser at a sheriff's sale, as a general rule, acquires the estate which the debtor possessed, and no other. In the case before us, the appellant acquired the title held by his debtor, and took no greater estate than she owned. The estate of the appellant's debtor, at the time his rights were acquired, was not an absolute estate in fee, but one determinable upon her death under coverture. The appellant, under the facts of this case, acquired no greater estate than a life-estate by his purchase at the sheriff's sale, and, unless there is some element in the case enlarging his rights, he owned no more than an estate for the life of his debtor.

It is contended that a judgment in a proceeding for parti-

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tion settled the appellant's title and fixed it as an estate in fee. This judgment was rendered in an action instituted by the appellant against the widow, then Sarah A. Gooding, and the children of the deceased, and was an ordinary suit for partition. It is not shown that the question of title was put in issue. There seem to have been only such pleadings as are ordinarily employed in partition proceedings, and only such an assertion of title as was sufficient to entitle appellant to partition. The object of the action, so far as this record shows, was solely to secure a division of the land and an allotment of shares. The decree neither settles nor professes to settle any question of title; it does no more than direct partition. As title was not put in issue, and as the decree does not attempt to settle any question of title, the titles of the respective parties were neither weakened nor strengthened. Ordinarily, proceedings in partition do not settle title; at all events they create no new title—they simply divide into separate shares the land as held under existing titles. *Utterback v. Terhune*, 75 Ind. 363; *Avery v. Akins*, 74 Ind. 283; *Teter v. Clayton*, 71 Ind. 237; *Knight v. McDonald*, 37 Ind. 463.

As the partition proceedings added nothing to the title vested in the appellant by the sheriff's sale, he has no other, and we have already seen what that title is. There is no conflict upon this point. The widow, who marries a second or subsequent time, having children by the former marriage, through which her rights are derived, takes, as against them, an estate determinable at her death, and her vendee can take no more. *Connecticut, etc., Ins. Co. v. Athon*, 78 Ind. 16; *Vin-nedge v. Shaffer*, 35 Ind. 341.

The appellant presses upon our consideration the case of *Crane v. Kimmer*, 77 Ind. 215, and there are some expressions in the opinion which seem to sustain his theory of the law. In so far as the expressions found in that opinion are in conflict with the cases we have cited, they must be deemed to be incorrect statements of the law. The point decided in that

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case was, that it was not error to admit in evidence the record of the partition proceedings, and that decision is right; but what is said about the title being put in issue and adjudicated in ordinary partition proceedings is wrong. That title may be put in issue, tried and settled in partition proceedings is true. *Cravens v. Kitts*, 64 Ind. 581; *Milligan v. Poole*, 35 Ind. 64; *Godfrey v. Godfrey*, 17 Ind. 6; *McMahan v. Newcomer*, 82 Ind. 565. It is not, however, correct to say that it is necessarily in issue in ordinary partition proceedings, where there are no other pleadings than such as are ordinarily employed, and no other decree than the usual one directing partition. As was said in *Avery v. Atkins*, *supra*, "The effect of the partition was to sever the respective shares, and not to change the source of title."

In ordinary partition proceedings, it is only necessary to allege and prove such a title as entitles the party to a division of the land. The adjudication in such a case goes no farther than to declare that such a right is shown as will support partition and to allot the shares to the co-tenants entitled to them. If a conclusive adjudication upon the character of the title is desired, issues must be formed directly and fully presenting that question for decision.

In *Crane v. Kimmer*, *supra*, it is said, that "Collateral questions may arise that may render it necessary to go back and enquire into how they" (the parties) "had derived their titles," and this is inconsistent with the theory that a judgment in an ordinary partition proceeding is conclusive upon the question of title. It is also said that the judgment fixes the rights of the parties to "their then title," and this statement is in harmony with the cases we have cited, for they lay down the rule that, ordinarily, a judgment in partition does not operate upon after-acquired titles, but only upon such as were in existence at the time of the rendition of the decree. This principle leads to an affirmance of the judgment, irrespective of the other considerations we have discussed.

Judgment affirmed.

Board of Commissioners of Parke County v. O'Conner *et al.*

No. 10,256.

BOARD OF COMMISSIONERS OF PARKE COUNTY v. O'CONNER
ET AL.

86	531
144	110
86	531
162	66

MECHANIC'S LIEN.—*Enforcement of Lien Against County.*—*Jurisdiction.*—*Motion to Dismiss.*—A suit to enforce a mechanic's lien, against the public square and court-house of a county, is not such a claim as the board of county commissioners have original jurisdiction of, under the provisions of sections 5758, 5759 and 5760, R. S. 1881; but the circuit court of the county has original jurisdiction of such a suit, and a motion to dismiss the suit for want of such jurisdiction is properly overruled.

SAME.—*Public Square and Court-House.*—*Acquisition and Enforcement of Lien.*—*Public Policy.*—*Public Necessity.*—The mechanic's lien law of this State contains no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use. In the absence of such a provision, public policy and public necessity alike forbid the acquisition or enforcement of such a lien against a public square or court-house of a county.

From the Parke Circuit Court.

G. W. Collings, for appellant.

S. D. Puett, T. N. Rice, J. T. Johnston, A. F. White and
— Hunt, for appellees.

Howk, J.—This suit was commenced on the 23d day of December, 1880, by the appellee William H. O'Conner as sole plaintiff, against the appellant and William A. Johnston, Samuel J. Johnston and William H. Myers, as defendants. The Johnstons and Myers are named as appellees, in appellant's assignment of errors, in this court. In his complaint the appellee O'Conner alleged in substance, that the appellant was the owner in fee of the public square, in the town of Rockville, in Parke county; that, on the — day of —, 1879, the appellant contracted with its co-defendant, William H. Myers, for the erection and building of a new court-house on said public square; that, on the — day of —, 187—, the defendant Myers contracted with his co-defendants, William A. and Samuel J. Johnston, partners under the firm name of Johnston Brothers, to furnish the material and do the gal-

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vanized iron work on said court-house; that, on the — day of —, 1880, the defendants Johnston Brothers employed the appellee O'Conner as a laborer, in doing the galvanized iron work on said court-house; that he, O'Conner, did work and labor on said new court-house, from the 15th day of November, 1880, up to the — day of December, 1880, working thereon 311½ hours, at — cents per hour; that the same remained due and unpaid; that Johnston Brothers paid appellee O'Conner for all his labor on said court-house up to November 15th, 1880, but had wholly failed to pay him for any of his labor thereon after that date; that, on the 22d day of December, 1880, and within sixty days from the close of, and order to quit, said work and labor by the defendants Myers and Johnston Brothers, the appellee O'Conner filed in the recorder's office of Parke county a notice in writing that he would hold a lien for said sum on said new court-house and public square; that said notice was directed to the appellant, and was duly recorded by the county recorder, in a book kept in his office for that purpose; that said notice of lien was filed with and made part of the complaint; and that said lien remained due and unpaid. Wherefore, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee O'Conner, in the sum of \$108.85, and that he had acquired a mechanic's lien therefor on the new court-house and public square. Over the appellant's motion for a new trial, the court rendered judgment for appellee O'Conner for the amount found due him and costs, and for the enforcement of his lien by the sale of the court-house and public square, as other lands were sold on execution, etc.

By the record of this cause and the appellant's assignment of errors thereon, the principal questions presented for decision, as it seems to us, may be thus stated:

1. Upon the facts stated in appellee's complaint, did the trial court have original jurisdiction of his claim against the appellant, the county of Parke?

2. Can a mechanic's lien be acquired upon, or enforced

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against, the court-house of a county, erected by its board of commissioners upon, and constituting an essential part of, the public square or site of such court-house, by a mechanic, material man or laborer thereon?

We will consider and decide these questions in the order of their statement.

1. The appellant moved the court to dismiss the action as to itself, because the appellee's complaint stated a claim against the county of Parke, of which claim the court had no original jurisdiction. This motion was overruled and an exception saved, and the ruling is assigned here as error. On the 29th day of March, 1879, an act was approved and became a law, and is still in force, entitled "An act regulating the presentation of claims against counties in the State of Indiana, before the board of county commissioners, and the adjudication of the same." The provisions of this act were substantially as follows:

Sec. 5758. "Whenever any person or corporation shall have any legal claim against any county, he shall file it with the county auditor, to be by him presented to the board of county commissioners."

Sec. 5759. "The county commissioners shall examine into the merits of all claims so presented; and may, in their discretion, allow any claim in whole or in part, as they may find it to be just and owing."

Sec. 5760. "No court shall have original jurisdiction of any claim against any county in this State, in any manner, except as provided for in this act."

The preceding three sections constitute all of the above entitled act, with the exception of the enacting clause and of the section declaring an emergency. Acts 1879, p. 106. The record shows that this suit was commenced as an original action in the circuit court; that the appellee O'Conner attempts to state in his complaint a legal claim against the county of Parke for work done by him, as a laborer, in the erection of the new court-house of the county, and that he had not filed

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such claim with the county auditor, nor presented the same to the board of county commissioners, for the adjudication thereof. It is not shown or pretended that the court below acquired jurisdiction of the claim of appellee O'Conner by an appeal from the action of the board of county commissioners thereon. In view of the statutory provisions above quoted, therefore, the question for decision is this: Did the circuit court have original jurisdiction of the claim or cause of action against the appellant, the county of Parke, stated in appellee's complaint?

If the appellee had alleged in his complaint such facts as would have shown that the appellant was indebted to him, for his work and labor in the erection of the new court-house, we would have no hesitancy in deciding that the court below could have no original jurisdiction of such a claim. But the appellee O'Conner did not claim that the appellant was indebted to him in any sum whatever for his work and labor, or on any other account. The substance of his complaint was, that Johnston Brothers were sub-contractors for furnishing materials and doing the galvanized iron work in the erection of the new court-house, on the public square of Parke county; that under the employment of such sub-contractors he performed a certain amount of work as a laborer, in the performance of their sub-contract, in the building of such court-house, and that he had taken the proper steps to acquire a mechanic's lien on such court-house and public square, for the amount due him for his work from such sub-contractors. Of such a cause of action against Parke county, if any he had, it is certain, we think, that the appellant had no jurisdiction, either original or appellate; while it is equally certain, as it seems to us, that the circuit court of the county did have original jurisdiction of such cause of action, if any such existed. We are of opinion, therefore, that the court did not err in overruling the appellant's motion to dismiss this action, as against itself.

2. In section 5293, R. S. 1881, in force at the time, it is

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provided as follows: "Mechanics, and all persons performing labor or furnishing materials for the construction or repair of any building, * * may have a lien separately or jointly upon the building which they may have constructed or repaired, * * for which they may have furnished materials of any description, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both."

Section 5296, R. S. 1881, in force at the time, prescribes the manner in which mechanics, laborers or material men may acquire such liens.

Under these statutory provisions, and upon the facts alleged in the complaint of the appellee O'Conner, the important and controlling question in this case is presented for decision, namely: Can a mechanic, laborer or material man acquire or enforce a lien for work done for or materials furnished to a contractor or sub-contractor, in and for the erection of a new court-house on the public grounds of the county, upon or against such court-house and the interest of the county in the land on which it stands, to the extent of the value of the labor done or materials furnished, or for both?

We are of the opinion that this question ought to be and must be answered in the negative. In the recent case of *Board, etc., of Pike Co. v. Norrington*, 82 Ind. 190, it was held by this court that a mechanic's lien can not be acquired upon, or enforced against, a public bridge erected by a county board on, and constituting a part of, a public highway, by a mechanic, material man or laborer. The court said: "We do not think that such a bridge can be regarded as a 'building' within the purview of section 647 of the civil code of 1852;" (section 5293, R. S. 1881); "and we are clearly of the opinion that public policy forbids either the acquisition or enforcement of such a lien upon or against such a bridge."

Doubtless, a county court-house is a "building" in any and every sense of the term, and the interest of the county in the land on which it stands is that of an owner, but in

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trust for the use of the public, and both the building and the land are the property of the county in its political as well as in its corporate capacity. It is true that the statute of this State provides in terms for the acquisition and enforcement of a mechanic's lien upon and against "any building"; but, broad and comprehensive as are the provisions of the statute, it must be construed in such manner as will not contravene settled principles of public policy. In *Wilson v. Commissioners, etc.*, 7 Watts & S. 197, it was held by the Supreme Court of Pennsylvania that the court-house and public offices of a county are not such buildings as come within the purview and meaning of the act of the Assembly, giving to mechanics and material men a lien for materials furnished for, and work done in, the construction thereof. In effect, the court said that it could not be supposed "that the Legislature could have intended, in any case, to subject a county to the privation or loss of its buildings, such as court-house, public offices or jail, so indispensably necessary for the public benefit and accommodation, as also for the preservation of the public records, containing the only evidence that thousands may have for their rights, and in which, it may be truly said, that every individual of the community has a deep interest."

In Phillips on Mechanics' Liens, section 179, it is said: "Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property of this description was meant to be included; and, to warrant this inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions." *Brinckerhoff v. Board of Education, etc.*, 37 How. Pr. 499; *Williams v. Controllers*, 18 Pa. St. 275; *Loring v. Small*, 50 Iowa, 271 (32 Am. R. 136); *Charnock v. District T'p, etc.*, 51 Iowa, 70 (33 Am. R. 116); *Thomas v.*

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Board, etc., 71 Ill. 283 ; *Board, etc.*, v. *Neidenberger*, 78 Ill. 58 ; *Poillon v. Mayor, etc.*, 47 N. Y. 666.

In *Leonard v. City of Brooklyn*, 71 N. Y. 498 (27 Am. R. 80), it was held by the Court of Appeals that, in the absence of an express statutory provision authorizing it, a mechanic's lien can not be enforced against the real estate of a municipal corporation held for public use. The court said: "If judgments in other actions can not be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly a judgment obtained under the lien law, which is the mere foreclosure of the notice which had previously been served and filed for work done for the benefit of the city, should stand in no better position. The act in question confers no special advantage, nor does it give a preference to a lien in any such case, and nothing is to be intended in favor of an enactment which interferes with a well-established principle, and changes a rule which has long been settled. To make such a material alteration, the law should be plain, explicit and clear, and there is no ground for holding that it was the intention of the law-makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express provision to that effect. The statute does not include such a case either in terms or by necessary implication." *Darlington v. Mayor, etc.*, 31 N. Y. 164 ; *City of Chicago v. Hasley*, 25 Ill. 485.

In *Ripley v. Gage County*, 3 Neb. 397, it was held by the Supreme Court of Nebraska, that the lien given mechanics, under the statutes of that State, for work done or materials furnished in the erection of any house or any other building, did not apply in the erection of public buildings for the use of a county. In the mechanics' lien law of this State there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use ; and, in the absence of such a provision, we must hold,

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in conformity with the weight of authority elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for such use. Our conclusion is, that the facts stated in the complaint of appellee O'Conner were not sufficient to constitute a cause of action in his favor and against the appellant, and that, for this cause, its demurrer to the complaint ought to have been sustained. Obviously, therefore, it is unnecessary for us to consider or pass upon any other error complained of.

The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

86	538
130	471
86	538
133	390

86	538
151	357
151	533
152	634

 No. 9634.

McCARDLE v. MCGINLEY.

MALICIOUS PROSECUTION.—*Measure of Damages.*—For unsuccessfully prosecuting any civil suit maliciously and without probable cause, an action lies for whatever damages have accrued beyond the taxable costs, the measure of damages in such action being such sum as will recompense the plaintiff for his time, trouble, etc., in defending the suit.

SUPREME COURT.—*Transcript.*—Where a defendant appeals, it is his duty to bring up a perfect transcript of the record, and if his answer be omitted, the Supreme Court can not know what were the issues, and, therefore, can not decide the effect of the verdict or answers of the jury to interrogatories, or any question as to the admissibility or sufficiency of evidence, or the giving or refusing of instructions.

From the Ohio Circuit Court.

W. S. Holman and *W. S. Holman, Jr.*, for appellant.

J. B. Coles and *J. W. Gordon*, for appellee.

MORRIS, C.—The appellee sued the appellant for malicious prosecution. The complaint contains three paragraphs.

The first, in substance, alleges that the appellant maliciously

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and without probable cause sued the appellee upon a false and groundless account before a justice of the peace of Ohio county, Indiana. It avers that the action was tried before a jury and a verdict returned in favor of the appellee, upon which judgment was rendered in his favor; that the appellant appealed to the Ohio Circuit Court; that said action was tried in said court before a jury, who returned a verdict for the appellee, upon which judgment was rendered in his favor, on the 3d day of July, 1879; that he had been put to great trouble and expense in defending said action, in procuring witnesses, employing counsel, etc.

The second paragraph of the complaint states that on the 6th day of March, 1879, the appellant maliciously and without probable cause brought an action against the appellee before a justice of the peace of said county, on a false and fraudulent claim that she had a right to the immediate possession of certain lands described in her complaint, and sought, in said action, wrongfully to deprive the appellee of said land; that said action was tried before the justice and a jury, and a verdict returned in favor of the appellee, on which judgment was rendered; that appellant appealed said suit to the Ohio Circuit Court; that, on her motion, the venue was changed to the Dearborn Circuit Court; that the action was there tried and a verdict and judgment had for the appellee, on the 22d day of March, 1880. The appellee says he incurred great expense in giving his time in attending the trial of said cause in the courts, procuring witnesses and employing counsel, etc.

In the third paragraph the appellee alleges all the matters set forth in the first and second paragraphs of the complaint, and substantially in the same way.

The appellant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant excepted.

The record states that the appellant filed her answer, but the answer is not in the record. The clerk states: "The an-

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swer was not returned with the papers—not on file.” The appellee replied to the answer by a general denial.

The cause was submitted to a jury for trial, who returned a general verdict for the appellee, with answers to interrogatories propounded by each party. The view which we have taken of the case renders it unnecessary to notice them.

The appellant moved for judgment upon the special findings, notwithstanding the general verdict. The court overruled the motion. She then moved for a *venire de novo*, which motion was also overruled. A motion was then filed for a new trial, which was overruled.

The errors assigned are that the court erred in overruling the demurrer to the complaint, and in overruling the motions for judgment on the special findings, for a *venire de novo*, and for a new trial.

The objection to the complaint is thus stated by the appellant: “ We insist that the general weight of judicial opinion is that a civil action, being a claim of right, when the party has only been subjected to the service of a summons, and neither his person nor property nor reputation has been touched, impaired or affected, the costs which the law gives to the successful party is the measure of compensation to which he is entitled if wrongfully summoned into court.”

It is too clear for discussion that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless civil action. The party sued must devote some time to the defence of the suit; he must look up his evidence and employ counsel. This waste of time and necessary expenditure of money, by its results, affects the property of the defendant. For these expenses the costs recovered in the action are no compensation at all. In some of the States reasonable attorney fees for the successful party are included in the taxable costs. It is not so here. No good and sufficient reason can be given why he who has maliciously and without probable

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cause instituted a suit against another should not be required to pay the party so sued such sum as will make him entirely whole. And so a majority of the decided cases in this country hold. *Lockenour v. Sides*, 57 Ind. 360 (26 Am. R. 58); *Closson v. Staples*, 42 Vt. 209 (1 Am. R. 316); *Whipple v. Fuller*, 11 Conn. 582; *Marbourg v. Smith*, 11 Kan. 554; *Burnap v. Albert*, Taney Cir. Ct. Dec. 244; *Cox v. Taylor's Adm'r*, 10 B. Mon. 17.

In the case of *Closson v. Staples*, *supra*, the court says: "We are of opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defence of that original suit, in excess of the taxable costs obtained by him; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only." To the same effect precisely is the case of *Whipple v. Fuller*, *supra*. In the case of *Marbourg v. Smith*, *supra*, the court says: "We suppose that an action for malicious prosecution can be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and terminated, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case."

We think the court did not err in overruling the demurrer to the complaint.

It is insisted by the appellee, that, as the answer of the appellant to the complaint is not in the record, this court can not know what the issues in the case were, and that, for this reason, this court must indulge the presumption that the court below did not err in its rulings upon the appellant's motion for judgment upon the special findings of the jury, for a *venire de novo*, nor for a new trial.

It was the duty of the appellant to bring up to this court a

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record fairly and fully presenting the questions upon which the court is asked to pass. It is obvious, that, in the absence of the answer of the appellant to the complaint, this court can not determine what the issues in the case were. Nor can we determine that the interrogatories answered by the jury were pertinent and relevant to the issues; nor whether the evidence was sufficient to sustain the verdict; for, as we can not determine what the issues were, we can not know what the verdict covered or embraced; nor can we determine the relevancy or irrelevancy of the charges given and refused. As the issues might have been such as to render the charges given proper, and to justify the court in refusing those which it did not give, we must presume that, in these respects, the court did not err.

While it is impossible to determine from the record what the issues in the case were, yet it might, perhaps, be plausibly maintained from what appears in the record, that the issues must have been such as to require proof on the part of the appellee of the material facts alleged in the complaint. But this is not certain, because, for anything that appears, the appellant may have pleaded a release of the damages only. This may not be probable, but still it may have been. The appellant could have made the record complete and certain, by seeing that it contained her answer. It was her duty to do this, and, not having done it, the only question properly presented for decision has been disposed of. The judgment below must be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be in all things affirmed, at the costs of the appellant.

Opinion filed at the May term, 1882.

Petition for a rehearing overruled at the November term, 1882.

Lowry v. McAlister et al.

No. 9001.

86	543
129	300

LOWRY v. MCALISTER ET AL.

HOUSEHOLDER.—*Proceeding Supplementary to Execution.*—*Pleading.*—*Exemption.*—In a proceeding supplementary to execution, the execution plaintiff must affirmatively show that the property sought to be reached is subject to execution, and the execution defendant, being a householder, has a right to plead his exemption in bar.

SAME.—*Evidence.*—In such case, evidence that the execution defendant was a widower, living with his three children at the house of his father-in-law, that he paid their board and supplied them with clothing and other necessities, fully established the claim that he was a householder.

PRACTICE.—*Supreme Court.*—*Surplusage.*—*Reversal.*—The refusal to strike out surplusage is not such an error as will warrant a reversal.

From the Parke Circuit Court.

S. D. Puett, for appellant.

T. N. Rice and *J. T. Johnston*, for appellees.

ELLIOTT, J.—This is a proceeding supplementary to execution, instituted by the appellant against the appellees. The affidavit, after stating the facts of the rendition of the judgment, the issue of the execution, and like matter, charges, that the defendant McAlister has property or money in the hands of the Parke Banking Company of Rockville, on deposit, of the value of one hundred dollars; that this sum is due him; that he unjustly, and with intent to defraud his creditors, claimed to have assigned this claim to his son, when in fact there was no such assignment, and the money remained in bank to the defendant's credit, and that he unjustly refuses to apply it towards the payment of plaintiff's judgment; that the defendant is not a householder, and has never claimed any property as exempt from execution.

Complaint is made of the action of the court in overruling appellant's motion to strike out an answer of the appellee McAlister claiming the money sought to be reached by the appellant exempt from execution, and asserting that he was a householder. There was no available error in this ruling. If the facts stated were true, and this the motion confessed, they

Lowry v. McAlister *et al.*

constituted a defence, for a householder has a right to plead in bar his exemption. Indeed, the rule is that the plaintiff in such a proceeding must affirmatively show that the property sought to be reached is subject to execution. *Abell v. Riddle*, 75 Ind. 345. If the facts stated amounted to nothing more than the general denial, then they were mere surplusage, and the refusal to strike out surplusage is not such an error as will warrant a reversal.

We do not think there was any error in excluding the evidence offered by the appellant to prove what the appellee said respecting the assignment of the certificate to his son, for that matter was not a relevant or material one under the allegations of the complaint. The issue tendered was, that the money belonged to the appellee, and was subject to seizure to pay the appellant's claim, and that the former had no right to claim it as exempt from execution, as he was not a resident householder. It was not necessary, to sustain this issue, to prove any assignment of appellee's claim against the banking company, and no harm resulted from refusing to permit it to be done. In fact, the evidence which appellant sought to elicit tended to overthrow rather than sustain the issue tendered, for, unexplained (and there was no offer of explanation), it would have proved that the money belonged to the son.

The evidence showed that the appellee was a widower, living with his three children at the house of his father-in-law; that he paid their board and supplied them with clothing and other necessities. This evidence fully established the claim that he was a householder. A person who has members of his family dependent upon him for support, and who does support them, is a householder within the meaning of the law. *Kelley v. McFadden*, 80 Ind. 536; *Bunnell v. Hay*, 73 Ind. 452.

Judgment affirmed.

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Volger et al. v. Sidener.

No. 9656.

VOLGER ET AL. v. SIDENER.

| 86 545
| 135 543

INJUNCTION.—*Delinquent Tax Sale.*—*Ownership of Personal Property.*—*Pleading.*—*Motion to Make Specific.*—Complaint by a purchaser of real estate at sheriff's sale, to enjoin its sale for delinquent taxes, alleging that the delinquent owner had "leviable personal property," etc.

Held, that a motion to make specific by a particular description of such personalty, and where situated, should have been granted.

BILL OF EXCEPTIONS.—*Time of Filing.*—*Presumption.*—Where a bill of exceptions is filed on a subsequent day of the same term at which a ruling is made, stating when the exception was taken, it will be presumed that time was given in which to file the bill, and that it was filed within the time so given.

From the Bartholomew Circuit Court.

F. T. Hord and *W. B. Hord*, for appellants.

A. Burns, *S. Stansifer* and *W. D. Stansifer*, for appellee.

ZOLLARS, J.—On the 9th day of February, 1880, appellee commenced this cause in the court below against appellants, as the treasurer and auditor of Bartholomew county, to enjoin the sale of the land described in the complaint, to make the amount of the delinquent taxes charged thereon. After various rulings on motions and demurrers a trial was had. A motion by appellants for a new trial was overruled, and a judgment was rendered perpetually enjoining the sale of the land. Exceptions were taken to the several rulings as made. Upon these rulings errors are assigned in this court. No question is made as to the legality or regularity of the assessment and levy of the taxes for the several years. The injunction is asked upon the ground that the treasurer had not collected the taxes from personal property.

The complaint is in two paragraphs. The following summary of the first paragraph we take from the brief of counsel for appellee: The first paragraph of the complaint shows that Sidener owned the land, the sale of which is sought to be enjoined, on the 1st day of April, 1877, and sold and conveyed

Volger et al. v. Sidener.

the same to John Book on the 1st day of September, 1877. The taxes for 1877, with delinquent taxes and penalties for the preceding year, were paid by Sidener, but the treasurer returned the land delinquent for non-payment, and the auditor recorded the land as delinquent and charged thereon the amount of \$23.74 delinquent taxes. Book not paying the taxes for 1878, the amount thereof, with penalty, together with said sum of \$23.74, were charged as delinquent against the land, it having been assessed in his name, and the delinquencies charged against him, and the land was advertised for sale, to pay said alleged, and in fact, delinquencies, together with the current taxes for the year 1879. Sidener holds by a sheriff's certificate of purchase of the land given on sale under a decree of foreclosure of mortgage executed to him by Book to secure his unpaid purchase-money, the amount exceeding the value of the land. Book is insolvent and unable to redeem. During the whole of the current delinquent year, 1879, Book had and owned in said county leviable personal property of the value of \$500, and still continues to hold and own a sufficient amount of leviable personal property in said county to pay said taxes, interest, penalty and costs; that no levy or other effort has been made to collect said unpaid taxes from the personal property of said John Book.

The portion of the second paragraph that we need notice particularly is in substance as follows: On and from the 1st day of April, until the 9th day of October, 1875, one William Kalor was the owner of and in the possession of the land. On the latter day he sold and conveyed the land to one Levi H. Young, who owned and was in possession of the same until the 20th day of January, 1877, when he conveyed it to appellee, who owned and continued in the possession of the same until the 18th day of September, 1877. On that day appellee conveyed it to John Book, and took from him and wife a mortgage to secure the purchase-money. This mortgage was foreclosed on the 29th day of March, 1879, the decree being

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for the amount due on the mortgage, and costs ; in all, \$2,042.--83. The land was sold by the sheriff on the 26th day of April, 1879, for \$525. Appellee was the purchaser, received a certificate from the sheriff, and held and owned it when this action was commenced. The judgment, with interest at ten per cent., except the \$525, is unpaid. The land is insufficient to pay the debt. Book is insolvent, and unable to redeem. The averments further show that the land was properly charged with taxes for the years named, as follows, viz. : 1875, \$21.04 ; 1876, \$18.82 ; 1877, \$16.90 ; 1878, \$26.58 ; 1879, \$23.88. Kalor paid \$7.27 of the tax of 1875, leaving \$13.77 unpaid and delinquent. Young did not pay the tax of 1876, nor the delinquent tax of 1875. Appellee paid the taxes of 1876 and 1877, as they became due, but the treasurer returned them as delinquent, and they were so charged by the auditor as delinquent. Book did not pay the tax of 1878, when it became due, nor the delinquent tax of former years, which had been carried forward and charged to him, making in all \$50.52. At the proper time the land was advertised for sale to make the amount of the delinquent taxes, to which was added the tax of 1879.

It is further alleged that said Kalor, on the 3d Monday of April, 1876, "and ever since said date, has owned and held in said county a large amount of leviable personal property, of the value of \$500, out of which said taxes might have been made ;" that Young, on the third Monday of April, 1877, "and for a long time thereafter, to wit, one year, owned and had leviable personal property in said county of Bartholomew, of the value of \$100, out of which all of the taxes of the year 1876, current and delinquent, could have been made ; that Book, on the third Monday of April, 1879, had and owned in said county, leviable personal property of the value of \$500, and continued to hold and own the same in said county."

It is further averred that no attempt has been made by the treasurer of said county, by levy or otherwise, to collect said unpaid taxes from the personal property of said Kalor ; that

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appellee pointed out to the treasurer the personal property of Young, but he failed and refused to collect the tax, or make any effort to do so, either by levy or otherwise, out of the said property of said Young; that the treasurer failed and refused to collect the said tax, or any part thereof, from the personal property of said Book, by levy or otherwise, and after the third Monday of April, 1879, returned the lands as delinquent. Appellant filed a motion to strike out portions of this paragraph, which was overruled and he excepted. Under the repeated decisions of this court, the overruling of such a motion is not an available error.

Appellants also filed a motion to have the complaint made more specific, as to the first paragraph: "To set forth particularly the property, and kind of property, owned by Book, subject to levy and the payment of taxes, and where it was situated, and when it was owned by him.

"To render the second paragraph of complaint more specific in this:

"1. To set forth with particularity a description of the personal property owned by William Kalor, and where the same was situated, and when it was owned by him.

"2. To set forth particularly the personal property owned by Levi H. Young, and where it was situated, and when he owned it.

"3. To set forth a specific description of the property owned by John Book and subject to levy, and where situated."

This motion was overruled, and appellants excepted. It was overruled on the 28th day of February, 1881. On the 7th day of March, 1881, at the same term of court, a bill of exceptions was filed embodying the motion, ruling and exception. There is no affirmative statement in the record that time was given in which to reduce to writing and file the bill. For this reason it is urged that the bill is not in the record. Under the code of 1852, in force at the time the bill was filed, it was necessary, to bring into the record an exception to a ruling upon a motion like the one above, that the bill should

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be signed and filed at the time of the ruling and exception, or that time should be then given, and the bill be filed within that time. It seems that if the time given was to a date in the term at which the exception was taken, it might be by parol, and evidenced by statements in the bill. The bill in this case shows that the exception was taken at the *time* the motion was overruled. It was filed on a day in the term at which the exception was taken. It has been held in former decisions of this court, that where a bill has been filed during the term, as this was, and contains the statement as to the time the exception was taken, as this does, it will be presumed that time was given, and that the bill was filed within the time so given. *Harrison v. Price*, 22 Ind. 165; *Johnson v. Bell*, 10 Ind. 363; *Flory v. Wilson*, 83 Ind. 391. Under these decisions, and we think they establish a reasonable rule, the bill of exceptions in this cause is in the record, and the questions raised by the motion to have the complaint made more specific are before us for decision.

The statute in force when the taxes were assessed and levied, and when this action was commenced, provided that real property should be listed and assessed to the owner or owners thereof, with reference to the amount owned on the 1st day of April, including all property purchased on that day, and that the owner on that day should be liable for the taxes of that year. 1 R. S. 1876, pp. 97 and 98, sections 102 and 103.

It further provided, that if such owners should neglect and refuse to pay their taxes, the treasurer should, after the third Monday of April of the year following the levy, collect the same by distress and sale of the goods and chattels of such person who ought to pay the same, etc. 1 R. S. 1876, p. 111, section 155, and p. 140, section 4.

Under these sections the tax of 1875 should have been paid by Kalor; the tax of 1876 by Young; the tax of 1877 by appellee, and the taxes of 1878 and 1879 by Book. If they neglected or refused to pay such taxes, the treasurer should have made the same by the distress and sale of their goods.

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and chattels. These taxes became a lien upon the personal property of each of said owners. The amount for which one of said owners was liable could not, however, be made by the sale of the personal property of another. *Mesker v. Koch*, 76 Ind. 68; *Blodgett v. German Savings Bank of Lafayette*, 69 Ind. 153; *Foresman v. Chase*, 68 Ind. 500.

If Kalor, Young and Book had, at the time this suit was commenced, and for a reasonable time before that date, personal property in the county sufficient in amount to pay the taxes due from them severally, and it was of such a nature and so situated that the treasurer, by the exercise of reasonable diligence, could have levied upon it, and made the amount of the taxes, it was clearly his duty to have done so; and the real estate could not be sold against the consent of the owner, until such personal property should be exhausted. This is the settled law of this State. Of the many cases we cite *Abbott v. Edgerton*, 53 Ind. 196; *Morrison v. Bank of Commerce*, 81 Ind. 335.

It is not the law, however, that because the treasurer may have neglected his duty, and the person against whom the taxes were assessed may have ceased to own personal property in the county out of which to make the tax, the lien upon the land was lost. The statute declared in explicit terms, that the lien for all taxes should attach on all real estate on the 1st day of April, and should be perpetual until payment. 1 R. S. 1876, p. 114, secs. 169 and 170; *Mesker v. Koch*, *supra*; *Rinard v. Nordyke*, 76 Ind. 130.

The many cases cited by the learned counsel for appellee are not in conflict with our construction of the statute in this case, and of the cases above cited. It will be found upon examination that those cases are based upon the fact of the existence of personal property at the time of the sale, or threatened sale, of the real estate. It is neither held nor intimated in any of them that the lien upon real estate may be lost by the carelessness or neglect of duty on the part of the treasurer,

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in collecting from personal property. From what we have said it follows that, in the case under consideration, it must appear from the allegations of the complaint, that, at the time this case was commenced, and for a reasonable time preceding that date, each one of the parties liable for the unpaid taxes of the several years as stated had personal property out of which the treasurer could have made such taxes, by the exercise of reasonable care and diligence. If either one of them did not have such personal property at the time indicated, the sale of the land could not be enjoined without the payment or tender of the amount for which he was liable. The rule is that if any portion of a tax is legal, and collectible by the sale of real estate, such portion must be paid or tendered before equitable relief against the sale will be granted. 76 Ind. 68 and 130, *supra*; *McWhinney v. Brinker*, 64 Ind. 360; *Mullikin v. Reeves*, 71 Ind. 281; *City of Delphi v. Bowen*, 61 Ind. 29.

It will be apparent from what we have said, that the allegations in relation to the possession and ownership of personal property are essential. They should be specific and certain, so that the defendants may readily know what they are called upon to meet by answer and proof.

In the case before us, we think that the court below erred in overruling the motion to make the complaint more specific. In the first paragraph the statement is that, during the year 1879, Book had and owned in said county leviable personal property of the value of \$500, and still continues to hold and own a sufficient amount of leviable personal property in said county to pay said tax, interest, penalty and costs. In the second paragraph the statement is that Kalor, since the third Monday of April, 1876, has owned and held in said county leviable personal property, out of which said taxes might have been made. The allegations in relation to Young are not important, as it appears that the tax for which he was liable was paid by appellee. The statement in relation to Book's

personal property is that, on the third Monday of April, 1879, he had and owned in said county leviable personal property of the value of \$500, and continued to hold and own the same in said county.

We think that the complaint should state the specific kinds of personal property. If it consisted of live-stock, grain, farming utensils, household goods, money, etc., it should be so stated. The word "leviable" does not dispense with the necessity of the specific allegations. The personal property upon which the statute makes the tax a lien includes money, stocks, bonds, etc. 1 R. S. 1876, p. 76, sec. 15; p. 114, sec. 170. All of these are "leviable," not only for taxes, but upon an ordinary execution. 2 R. S. 1876, p. 207. But money and bonds can not be levied upon unless turned out. For aught that appears from the statements in the complaint, the personal property owned by Kalor and Book may be such that the treasurer could not levy upon it, unless turned out. It may be such that they can conceal, and have concealed it from him. The law gave him no power to reach property by any extraordinary proceedings; and if it had it would not follow that he should resort to such remedy before selling the real estate upon which the tax is a lien. The second paragraph should be more certain as to the time when Book had and owned personal property in the county. See *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Bunnell v. Farria*, 82 Ind. 393.

Having reached the conclusion that the judgment must be reversed, by reason of the error in overruling the motion for an order to have the complaint made more specific, it is unnecessary for us to examine and decide other questions discussed by counsel.

The judgment is reversed, at the costs of appellee.

Milligan v. The State, *ex rel.* Children's Home of Cincinnati, Ohio.

No. 9330.

MILLIGAN v. THE STATE, EX REL. CHILDREN'S HOME OF
CINCINNATI, OHIO.

HABEAS CORPUS.—*Pleading.*—*Foreign Statute.*—"Children's Home."—*Custody of Child.*—*Complaint not Cured by Reply.*—In an action by a foreign corporation to enforce a statutory right to the custody of a child, the complaint must set forth according to its tenor so much of the foreign statute as is relied on; and defects of the complaint in this respect can not be cured by the reply.

From the Delaware Circuit Court.

C. E. Shipley and *R. S. Gregory*, for appellant.

J. S. Buckles and *J. W. Ryan*, for appellee.

WOODS, C. J.—*Habeas corpus.* The appellant has assigned error upon the overruling of his motion to quash the writ, his exceptions and demurrer to the reply to his return to the writ, and that the complaint does not state facts sufficient.

The complaint, stated generally, shows that the "Children's Home" is a corporation, organized at Cincinnati, Ohio, under the general laws of that State, and empowered, among other things, to receive and take charge of homeless and indigent children surrendered to it by their parents or guardians, or by the courts or other legal authority, to act as guardian for such children during their minority, and to procure for them, when deserved, permanent homes in Christian families, and to remove any child from a home procured for it whenever, in the judgment of its trustees and managers, the home so procured for the child is unsuitable; these powers being conferred by a statute of the tenor following, to wit:

"CHAPTER 5. CHILDREN'S HOMES.

"Sec. 2185. The trustees and managers may remove a child from a home when, in their judgment, the same has become an unsuitable one, and they shall, in such cases, resume the same power and authority as they originally possessed; but they may return a child to parents or a surviving parent or guardian, or when they believe the child to be capable of

Milligan v. The State, *ex rel.* Children's Home of Cincinnati, Ohio.

caring and providing for himself, may discharge him to his own care."

That this statute was in force at the time when the agreement was made with the appellant, and has remained in force; that on the 28th day of May, 1879, Laura Belle Hutchins, aged twelve years, was surrendered to the guardianship of the home by her parents, under an agreement in writing, which is set out in the complaint, and was kept and cared for by the home until the 16th day of September, 1879, when, upon recommendation that the appellant was a proper person, and his home a suitable one, the relator entrusted said child to the appellant, under a written agreement, a copy of which is also embodied in the complaint; that afterwards, in October, 1880, in the due exercise of the powers and discretion conferred on them by law, the trustees and managers of the home became satisfied, and, upon deliberation, determined that in their judgment the defendant was not a proper person to have the care, custody, and religious and moral training of said child during minority, and that his home had become unsuitable for her; and thereupon notified the defendant of that judgment, and on the 10th day of November, 1880, demanded of the defendant, at his home, in Indiana, the surrender and custody of said child, that a suitable home might be provided for her by the relator; but defendant refused, and still unlawfully refuses, to surrender her to the plaintiff's care and custody. Wherefore, etc.

No other parts of the statute under which the relator claimed to be organized and acting are set out in the complaint, and it is objected that for this reason the complaint is insufficient.

We think the objection well taken. It was necessary that the relator should have pleaded so much of its charter as was requisite to establish in its favor a *prima facie* right to the custody of the child in question. The right which it asserts is not a natural one, and can exist only by the force of positive statute; and the statute relied on, being a foreign one, must be pleaded according to its tenor, so as to put it in the

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power of the court to construe or interpret it. *Wilson v. Clark*, 11 Ind. 385; *Mendenhall v. Gately*, 18 Ind. 149; *Kenyon v. Smith*, 24 Ind. 11; *Tyler v. Kent*, 52 Ind. 583.

It may be, as has been suggested, that the appellant is estopped by his contract from denying the corporate existence of the Children's Home; but, in order to prevail in the action, it was necessary for the relator to show that it had the alleged power to receive children into its care and guardianship, to the exclusion thereafter of parents or other lawful guardians, to entrust their care to others, and to reclaim them again at its own discretion. The estoppel of the contract does not, if it could be made to, extend to these things, and they could be proved only by proving parts of the statute which, if they exist, are not set out in the complaint. The portion set out is in itself incomplete, and can be fully understood, manifestly, only when read in connection with other parts of the enactment from which it was taken.

Other parts of the statute are set out in the reply, but a bad complaint can not be made good by anything found in the replication.

Judgment reversed.

86	555
128	414
86	555
162	479

No. 9559.

HESSONG v. PRESSLEY, SHERIFF.

SHERIFF.—*Failure to Levy Execution.*—*Special Findings.*—*Evidence.*—*Conclusions of Law.*—*Exception.*—Where the court, finding the facts specially, in an action against a sheriff for failure to levy an execution, finds that the sheriff made a certain return to an execution, and copies such return, this is not a finding of the facts stated in the return, but merely a finding of evidence, and an exception to conclusions of law, which exception is good only if the facts stated in the return are true, should be overruled.

SAME.—*Nominal Damages.*—A sheriff, having for service several executions

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against a party who has goods subject to levy, but not sufficient to satisfy the senior writs, is liable to the plaintiff in the junior writ for failure to levy, but for nominal damages only.

SAME.—Return.—Evidence.—Facts stated by a sheriff in his return to an execution, as a reason why he did not levy, are not to be deemed conclusively true even as against the sheriff himself.

From the Superior Court of Marion County.

I. Klingensmith, for appellant.

W. W. Herod and *F. Winter*, for appellee.

FRANKLIN, C.—Appellant sued appellee as sheriff of Marion county for failing to levy an execution. The cause was tried before the court. At the request of the plaintiff the court made a special finding, and stated its conclusions of law, in favor of the plaintiff, for nominal damages, and rendered judgment accordingly. The plaintiff excepted to the conclusions of law, and appealed to the general term of the court, assigning as error the overruling of his exceptions to the conclusions of law. The court at general term affirmed the decision of the court at special term, and the plaintiff appealed to this court, assigning as error the affirmance of the judgment in general term.

The special finding of facts is substantially as follows: That the defendant at the time was sheriff of Marion county, Indiana; that the plaintiff recovered a judgment on the 15th day of January, 1878, in the superior court of said county, against one Thomas Schooley for the sum of \$1,078.92, and costs; that he caused execution to be issued on the same on the 23d day of January, 1878; which came to the hands of the defendant on the 24th day of January, 1878; that the defendant, at the time of receiving said execution in favor of the plaintiff, already had in his hands, as such sheriff, other executions against said Thomas Schooley in favor of other parties, for the various sums therein named, aggregating the sum of \$6,163.78; that during the lifetime of said executions, including the plaintiff's, said Schooley was the owner of personal property, in said county, of the value of \$1,895, which fact

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was known to said Pressley, but that he omitted to levy the plaintiff's execution as aforesaid, although often requested to do so, or to levy either of said prior executions upon said personal property, or any part thereof, before the return day of said executions, and suffered the same to expire, and returned the same, including the said plaintiff's execution, at the dates therein following, with the returns thereon endorsed respectively. Then follow copies of the respective returns, with a statement of fact to each that it was renewed; that said Schooley remained in the possession of all of said property until the month of September, 1878, when he sold a part thereof for the sum of \$800, which he appropriated to his own use. The residue of said property remained in his possession until the 2d day of October, 1878, when the defendant herein levied upon the same by virtue of an execution against said Schooley in favor of one Joshua Zimmerman, which came to the hands of said sheriff on the 4th day of April, 1878, and sold the same, under said execution, on the 22d day of October, 1878, realizing therefor the sum of \$800, which said sheriff applied to the payment of said Zimmerman execution and a decree of foreclosure in favor of one William H. English against said Schooley, which had come to the hands of said sheriff on the 20th day of April, 1878, and which provided that any balance remaining unpaid thereon after the sale of the mortgaged premises should be levied of any other property belonging to said Schooley subject to execution. Then the returns of the sheriff on said Zimmerman and English writs are set out *verbatim*: "And upon these facts the court states, as a conclusion of law, that, had the sheriff levied the plaintiff's execution, and collected money thereon, it would have been his duty to have applied such money upon the senior executions, and such application would have exhausted all of the money that could have been realized upon such execution from the property of said Schooley; that of such application to the senior executions, had levy and sale been made, the plaintiff herein would have

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had no cause to complain, and, therefore, the plaintiff has suffered no more, at most, than nominal damages."

As an objection to these conclusions of law, it is insisted by appellant's counsel that the oldest execution in favor of Ridenour for \$399.35 was all paid off but \$10, and that all the other senior executions, to wit, *Scott v. Schooley*, *Holmes v. Schooley*, *Dawson v. Schooley*, and *First National Bank v. Schooley*, were each dormant, held by the sheriff under orders from the plaintiffs not to levy, and, as to the plaintiff, they were not senior.

There is no fact stated in the court's special findings as to any part of the Ridenour judgment having been paid. Nor is there anything therein stated as a fact in the case, showing that either of the senior execution plaintiffs had directed the sheriff not to levy his execution. But it is claimed by appellant that the return of the sheriff endorsed on the Ridenour execution shows payments made thereon; that the return endorsed upon the Scott execution shows that the sheriff, "having held this writ by order of the assignee of the judgment herein, until the time for return having expired, the same is now returned to be renewed;" that the return on the Holmes execution shows that "this writ is now returned by order of the plaintiff's attorneys. See order on back. Endorsed, 'Return this. DYE & HARRIS.'"

The return on the Dawson execution shows that "the same is now returned to be renewed, the same having been held by order of the assignee."

The return on the First National Bank execution shows that "the time allowed by law for the return of this writ having expired, the same is now returned to be renewed, the same having been held by order of the plaintiff."

These respective executions were for the following amounts: The one in favor of Scott, \$2,208.87; Holmes, \$388.15; Dawson, \$902.32; Bank, \$2,165.09; Ridenour, \$399.35, with interest and costs added to each.

If these returns were considered proper parts of the state-

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ment of the findings of special facts, it is very questionable whether they amount to orders or directions not to levy, so as to make the executions dormant. To "hold" here literally means to keep, retain possession of, until the return day. But we do not think these returns constitute proper parts of the statement of facts. They at most are only evidentiary facts, without any findings by the court as to their truth, or the facts inferred therefrom. The law requires the facts to be stated, and not the evidence. *Tousey v. Lockwood*, 30 Ind. 153; *Kealing v. Vansickle*, 74 Ind. 529 (39 Am. R. 101); *Locke v. Merchants Nat. Bank*, 66 Ind. 353; *Parker v. Hubble*, 75 Ind. 580; *Woodfill v. Patton*, 76 Ind. 575 (40 Am. R. 269). Facts not found are presumed not to be proved. *Ex parte Walls*, 73 Ind. 95; *Talburt v. Berkshire L. Ins. Co.*, 80 Ind. 434.

But it is claimed that the facts stated in these returns are conclusive—that they are to be considered as true, and have the same effect as if found to be true by the court. This court has held otherwise, and we think correctly so.

In the case of *Lindley v. Kelley*, 42 Ind. 294, it is said: "The return of an officer on an execution can only be evidence of the facts as between the parties, when the facts stated are official acts done in the ordinary and usual course of proceedings. Matters of opinion or excuse for failure to perform a duty can not be made evidence by stating them in the return, but must be proved on trial."

In the case of *Splahn v. Gillespie*, 48 Ind. 397, pp. 407–8, it was held that "a return is conclusive against the officer who makes it, and is *prima facie* evidence in his favor. * * The return of an officer on *mesne* or final process can be evidence of the facts stated therein, only when the facts recited are official acts done in the ordinary and usual course of proceedings. Matters of opinion or excuse for failure to perform a duty can not be made evidence by stating them in the return, but must be proved on the trial." See authorities cited in support thereof. If it were otherwise, and the return held con-

Bodkin et al. v. Merit.

clusive, a sheriff could always relieve himself from liability for his laches of official duty in relation to executions.

An exception to the conclusions of law only brings in review the rulings of the court upon the findings of the facts as having been proved, and not upon mere copies, statements or findings of the evidence. The contents of the sheriff's statements in his returns can not be considered as facts found by the court, when the court has not found anything in relation to them.

We do not think that the contents of these returns constitute any part of the inferential facts found by the court, and that they can not be considered under an exception to the conclusions of law. Objections to the findings must be taken advantage of otherwise than by exceptions to the conclusions of law.

If the prior executions were not paid nor dormant, the fact that they held a prior lien upon Schooley's property is not controverted; and it is clear that plaintiff did not sustain more than nominal damages by the non-levy and sale under his execution; and there was no error in the affirmance of the judgment.

The judgment of the general term ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion that the judgment of the general term of the court below be and it is in all things affirmed, with costs.

No. 10,130.

BODKIN ET AL. v. MERIT.

MORTGAGE.—*Indemnity.*—*Action by Mortgagee to Foreclose.*—*Judgment Against Principal and Surety.*—A mortgage to a surety to indemnify him, which covenants to pay the debt and indemnify the surety, gives a right of action to the surety before payment to foreclose on failure to pay at maturity, if the debt has gone into judgment against the principal and surety, and there be no property of the former, except the mortgaged property, subject to execution.

86	560
131	48
86	560
144	417
147	317
86	560
156	12

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SAME.—*Mortgage not Satisfied by Renewal Note.*—A mortgage to secure the payment of a certain note is not satisfied by the giving of other notes in renewal. The debt, and not the mere evidence of it, is the thing secured, and so long as this subsists in any form, the mortgage remains to secure it.

From the Switzerland Circuit Court.

J. D. Works, J. A. Works and S. R. Downey, for appellants.
S. Carter, W. R. Johnston and F. M. Griffiths, for appellee.

ELLIOTT, J.—The complaint of the appellants asks that a judgment and decree, rendered against them in an action on a mortgage executed to appellee to indemnify him against loss upon an undertaking as surety, may be reviewed and set aside upon the ground that the complaint in the former action was insufficient.

The objection first urged against the complaint in the former action is, that it does not show that the plaintiff in that action suffered any loss or paid any money on account of his suretyship. The complaint does not show that the surety has paid the indebtedness for which he was liable, but it does show that judgment has been taken for it against him and his principals, and that the latter have no other property subject to execution than that embraced in mortgage. This instrument does contain an express promise to pay the indebtedness for which the appellee was surety, and as the appellants are shown not to have paid it, there is a breach of the condition and a complete right of action. The judgment settles the amount the appellee is bound to pay, the complaint shows that it can only be made out of the property mortgaged, and there can be no doubt of the right of the mortgagee to a decree of foreclosure. In *Gunel v. Cue*, 72 Ind. 34, it was held that where a mortgage made to secure a surety from loss contained a provision similar to that written in the one under immediate mention, it bound the mortgagor to pay the debt, and that a breach of this covenant conferred an immediate right of action. It is well settled that such a covenant is, as PARKE, B., said, in *Loosemore v. Radford*, 9 M. & W. 657, “an

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absolute and positive covenant by the defendant to pay a sum of money on a day certain." *Devol v. McIntosh*, 23 Ind. 529; *Weddle v. Stone*, 12 Ind. 625. The case of *Tate v. Booe*, 9 Ind. 13, which seems to assert a different doctrine, was expressly overruled in *Johnson v. Britton*, 23 Ind. 105.

It is said, however, that the covenant expressed in the words "and the mortgagors agree to pay the sum above secured," refers to a sum named in the mortgage as due the mortgagee. We can not so read the instrument. It is a familiar rule that all the provisions of a contract are to be considered for the purpose of ascertaining the intention of the parties, and that, when the intention is ascertained, it shall be carried into effect. Taking into consideration all the provisions of the instrument before us, it is perfectly clear that the mortgagors covenanted to pay the entire indebtedness described in the mortgage, and not merely a part of it. In verification of our conclusion, we need quote only one of the other provisions of the mortgage, and this is the one which reads thus: "Now, if the mortgagors pay said sums of money and all interest thereon, and save the mortgagee from any and all liability thereon, this mortgage to be of no effect, otherwise to be in full force as a security and indemnity as aforesaid." This means that the mortgage shall secure all the sums which the mortgagors have agreed to pay, and shall also stand as an indemnity to the mortgagee for all incidental losses, as costs and the like.

It is also contended that the complaint does not identify the indebtedness secured. We are clear that the mortgage on its face does this, but if we are wrong in this, it is quite certain that the complaint, by a proper statement of facts, does, and this, it is settled, is sufficient where, as here, the mortgage itself supplies ample means of identification.

The fact that the notes which were originally given were renewed by others executed in their place, and for the same debt, does not release the mortgage. It has been many times decided that a mortgage stands for the debt, although there

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may be many changes in the forms of the evidence of indebtedness, and that notes given in renewal of the original note or notes are covered by the mortgage, and that it remains as a security for the latter. *Mayer v. Grottendick*, 68 Ind. 1; *McCormick v. Digby*, 8 Blackf. 99; *Cissna v. Haines*, 18 Ind. 496; *Dumell v. Terstegge*, 23 Ind. 397. A good statement of the law is that of Mr. Jones, who says: "No change in the form of the indebtedness or in the mode or time of payment will discharge the mortgage. A mortgage secures a debt, and not the note, or bond, or other evidence of it." 2 Jones Mortg., section 924.

Judgment affirmed.

No. 9468.

DILKS, ADMINISTRATOR, v. HAMMOND.

86	563
147	457

ARBITRATION AND AWARD.—Parol Submission.—A parol submission to arbitration binds the parties to an award fairly made, though one of the parties refused to make the submission in writing, unless the submission be revoked before the award is made.

SAME.—Action on Award.—A valid award settles the matter submitted, and precludes enquiry as to whether a good cause of action existed, where suit is brought on the award.

From the Clark Circuit Court.

M. C. Hester, for appellant.

J. K. Marsh, for appellee.

BLACK, C.—This was an action on a common-law award, commenced by Martha Dilks and her husband against the appellee. Pending the action said Martha died, and the appellant, administrator of her estate, was substituted as sole plaintiff, and filed an amended complaint. There was an answer of general denial, and the cause was tried by a jury, who found for the appellee. A motion for a new trial, made by the appellant, was overruled.

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The only question before us is whether the verdict was sustained by sufficient legal evidence. The evidence consisted of the written award signed by the arbitrators and the testimony of the arbitrators.

The chief controversy here is as to whether the evidence showed a submission to arbitration.

Enoch Giltner testified that he was requested by the husband of said Martha to act for her, in conjunction with John T. Hamilton, as an arbitrator, to settle a matter of difference between her and the appellee; that he went, in accordance with this request, to hear said matter, on a day mentioned, and met said Martha, her husband, the appellee and said Hamilton at the house of Mr. Dilks; that, before they went into the investigation, Hamilton said that he thought it would be necessary for the parties to go into writings, to make the matter binding; that the appellee said he would not go into writings, but that they could go ahead with the arbitration without the writings; that the arbitrators then heard the statements of the parties, and, after they had heard all their evidence, went out into the orchard and made up their award, reduced it to writing, and both signed it.

The witness identified the written award and testified that the matter the arbitrators were called on to settle was the matter mentioned in said writing; that the appellee made no objection to the arbitration before the arbitrators made their award, further than to say that he would not go into writings; that he said they could go on with it without writings; that, after they had made the award, he said it was a large award, and he could not pay it without selling a part of his farm.

John T. Hamilton testified that the appellee requested him to act as an arbitrator for him, in conjunction with Enoch Giltner, who, appellee said, was to represent Mrs. Martha Dilks, to settle a matter in difference between her and the appellee; that, at his request, witness met Giltner at the house of Dilks, for the purpose of making the arbitration; that there were present the persons mentioned as being pres-

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ent by Giltner in his testimony ; that witness said to all the parties present that he thought the parties would have to go into writings in order to make the arbitration legal and binding ; that the appellee said he would not sign any writings, but that they could go ahead without writings. Witness testified that he thought the arbitration would only be an experiment, because the parties had not signed any writings to arbitrate ; that he did not know that he then said it would only be an experiment, but that he said something like it ; that the appellee made no other objection to the arbitration before the award was made ; that witness and said Giltner heard the statements of the parties, and then went out and made their finding ; that their award was made in writing ; that witness wrote the award, and that he and Giltner signed it ; that when they returned into the house and read the award, the appellee said it was for too large a sum, and he could not pay it without selling his farm. This witness also identified the award.

Said Giltner, having been recalled, testified that there was nothing said by the parties, at the time of the arbitration or before, about its not being binding, or its being only experimental ; that Hamilton said he thought, to make it binding, it ought to be agreed to be in writing signed by the parties ; that the appellee said, " No, he would not sign any writing ; to go ahead with it without any writing. He said, ' Go ahead and try the case so, ' for he would not sign any writing ; " that Hamilton read the award to the parties, and appellee said it was too much ; that he could not pay it without selling part of his land ; that he would study about it and see whether he would pay it or not.

The award stated the nature of the matter in dispute between the parties ; that the parties had submitted the matters in controversy to the decision of the signers of the award ; that they had heard the statements of the parties, and duly considered the same ; and it then proceeded to state the amounts to which, in their judgment, said Martha was en-

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titled, and "that the whole amount she is entitled to is two hundred and forty-six dollars."

A parol submission was sufficient, and was binding, unless unconditionally revoked before the making of the award. *Griggs v. Seeley*, 8 Ind. 264; *Carson v. Earlywine*, 14 Ind. 256; *Miller v. Goodwine*, 29 Ind. 46; *Goodwine v. Miller*, 32 Ind. 419; *Shroyer v. Bash*, 57 Ind. 349; *Boots v. Canine*, 58 Ind. 450; *Webb v. Zeller*, 70 Ind. 408; *Morse Arb.* 50, 229, 230.

There is no pretence of fraud or unfairness, or of any misconduct, or that the matter in controversy was not investigated and decided. There was a suggestion, not made by either party, but by one of the arbitrators, that the submission be reduced to writing, but the suggestion was not adopted; and the arbitrator who made it entered upon the investigation, wrote the award, with the other arbitrator signed it, and read it to the parties. It does not appear, and is not suggested, that his decision was influenced by the fact that he thought that the submission should have been in writing; nor does it appear that the parties, or either of them, regarded the arbitration as an experiment only. After manifesting an intention to be concluded by the award, and taking his chances for a decision in accord with his wishes, and having a full opportunity, which he made use of, to present his case to the arbitrators, one of the parties objected to the award merely because of the largeness of the amount found against him.

It was not necessary in the action on the award to prove that the parties agreed to be bound by the award; the agreement to submit to arbitration implies an agreement to abide by the decision of the arbitrators. *Morse Arb.* 52.

The settlement of controversies by arbitration is to be encouraged, and awards are not to be set aside or impeached for slight causes. A party can not be permitted to ignore the decision of judges so selected, merely because he does not approve of their finding.

Counsel for appellee say that it does not appear when the

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amount claimed became due. The award stated that "the whole amount she is entitled to is \$246." The amount thus awarded was due upon the making of the award.

Counsel further say, that the claim of appellant's intestate was barren of equity; that it was not such as to commend itself to the favorable consideration of the jury or the judge who presided at the trial.

The claim was tried before the arbitrators, and the question whether it was a just or reasonable claim could not properly be considered on the trial of the action on the award. It is not necessary that a legal cause of action really exist in favor of a party to a submission to arbitration in order that the award shall be binding. Morse Arb. 36.

We think that the verdict was contrary to the evidence, and that the court erred in overruling the motion for a new trial.

PER CURIAM.—It is ordered, on the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and that the cause be remanded for a new trial.

No. 9992.

CORY ET AL. v. CORY.

WILL.—Conditional Devise of Land.—Condition Subsequent.—Forfeiture.—Re-entry.—Demand.—Sheriff's Sale.—Deed.—Title.—To defeat an estate for breach of a condition subsequent, there must be a demand of performance upon the person who owns the land, and a re-entry for condition broken by the party entitled, or the equivalent of a re-entry. Such demand upon the grantee after a sheriff's sale of his estate, which, after the demand, matures into a conveyance by the sheriff, is not sufficient, inasmuch as the title conveyed by the sheriff's deed takes effect by relation on the day of the sale.

From the Union Circuit Court.

J. I. Little, for appellants.

J. F. McKee and D. W. McKee, for appellee.

86	567
153	459
86	567
162	16
162	532
162	533

Cory et al. v. Cory.

BICKNELL, C. C.—Jeremiah Cory devised one hundred acres of land to his son Moses W. Cory, on condition that he should make ample provision for the comfort and maintenance of his sister Catherine during her natural life.

The appellants, who are the heirs of said testator, brought this suit against the appellee on the 23d of November, 1880, alleging that they are the owners as tenants in common of said land, except an undivided twelfth part thereof owned by defendant; that the land was devised as aforesaid to Moses W. Cory; that ever since March 12th, 1879, he has failed and refused to support and maintain said Catherine, although often requested thereto by plaintiffs on her behalf; that plaintiffs, as such heirs at law, upon such failure, became the owners of said land, and as such owners have entered upon and taken possession of it; that defendant claims title thereto under a sheriff's deed, made upon the foreclosure of a mortgage executed by said Moses to one Johnson, but that said condition was broken before the date of said deed. The plaintiffs demanded that said undivided eleven-twelfths be set off to them in a body, and that their title thereto be quieted, etc. Copies of the will and probate were annexed to the complaint.

The defendant answered each of the two paragraphs of the complaint by a general denial. He also filed a counter-claim to the entire complaint in two paragraphs:

1. That defendant owns all of said land, subject to a claim in favor of said Catherine thereon, for her comfortable sustenance and support during life, and praying that his title be quieted as against all the plaintiffs except said Catherine, and that she be declared without interest in the land, except a lien thereon for her comfortable sustenance and support during life.

2. Admitting the seizin of Jeremiah Cory, and the devise to Moses on condition, and the heirship of the plaintiffs and Moses Cory, as stated in the complaint, and alleging that, on October 1st, 1875, said Moses, under said devise, was the owner of said land in possession, and on that day borrowed

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from one Johnson \$3,000, and to secure the same mortgaged to him the land, representing it to be free from encumbrances, said Johnson having then no knowledge of said condition, all of which was well known to said Catherine; that said \$3,000 was not paid, and Johnson thereupon foreclosed his mortgage, said Catherine being a party to the foreclosure suit, and her interest being protected by the judgment therein; that at the foreclosure sale, on February 15th, 1879, Johnson bought the land for \$4,094.55, the amount due on the mortgage, which was much more than the value of the land, subject to the aforesaid condition; that said Moses Cory was then insolvent, and had made an assignment in bankruptcy, and had no other property subject to execution; that Johnson, on November 18th, 1879, assigned the sheriff's certificate of sale to the defendant, who, the land not having been redeemed, received from the sheriff, on February 23d, 1880, a deed therefor; that under said deed the defendant owns the land in fee simple, and is entitled to the possession thereof; that, if there has been any breach of said condition, it was without the consent or connivance of this defendant or of said Johnson; that defendant holds the land subject to said condition; that said Catherine had knowledge of said Johnson's claim long before the foreclosure of said mortgage; that defendant is now and always has been ready to perform said condition, and has offered to support said Catherine according to said devise, but she has refused to permit him to do so; that any breach of said condition by said Moses was made for the fraudulent purpose of defeating said Johnson's claim and this defendant's title, by the consent and connivance of said Catherine and her co-plaintiffs; that any such default of said Moses, in the year 1879, was waived by said Catherine, who was again supported by him until the — day of ———, 1880, after the defendant had received said sheriff's deed, when said Moses abandoned the land and left Catherine in possession of it, who has ever since made her home upon it, this defendant having permitted her to be undisturbed in said possession, and to en-

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joy thereon a bountiful support therefrom; that before and since said foreclosure said Catherine has resided near said Johnson and this defendant, but neither of them has been notified of any breach of said condition by said Moses, and that no demand for the performance of said condition was ever made upon either of them; that said Moses has substantially complied with said condition; that the plaintiffs' claim is a cloud upon the defendant's title. The prayer of this counter-claim is, that the defendant may be decreed to be the owner of the land, and entitled to the possession thereof, subject to the condition aforesaid, and that his title be quieted, etc.

The plaintiffs filed an answer in denial of each paragraph of the counter-claim. The issues were tried by the court upon "an agreed statement of facts in writing."

The court found for the defendant upon the complaint and upon the counter-claim, and that he is the owner in fee simple of the land, and has been such owner since February 23d, 1880, the same being subject in his hands to a claim in favor of the plaintiff Catherine Cory, for her support, as provided in the last will of Jeremiah Cory, deceased.

The record here states "to all of which finding and conclusions of law plaintiffs except and object." The finding was made at October term, 1881. At January term, 1882, the plaintiffs moved for a new trial, alleging the following reasons therefor:

1. The findings are contrary to law.
2. The findings are contrary to the evidence.
3. The findings are contrary to law and the evidence.
4. There was not a proper submission of said cause.

This motion was overruled; judgment was rendered pursuant to the findings. The record here states, "to all of which judgment the plaintiffs object and except." The plaintiffs appealed; they assign errors:

1. In the conclusions of law upon the facts found.

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2. In the conclusions of law upon the facts set forth in the agreed statement of facts.

3. In overruling the motion for a new trial.

4. In finding against Catherine Cory.

5. In rendering judgment against the plaintiffs, quieting the appellee's title.

It appears by the bill of exceptions, that the evidence consisted of an agreed statement of facts. It was not a trial upon an agreed case under section 386 of the code of 1852, which is section 553 of R. S. 1881; there was no affidavit. The findings were not special under section 341 of the code of 1852, which is section 551 of R. S. 1881, because neither party requested a special finding. The findings were general, involving conclusions of law and fact. There were, therefore, no conclusions of law to be excepted to, and the first and second specifications in the assignment of errors present no question. *Smith v. Johnson*, 69 Ind. 55; *Martin v. Martin*, 74 Ind. 207; *Downey v. Washburn*, 79 Ind. 242. In such a case, in order to bring up the question whether the decision was contrary to the law and the evidence, a motion for a new trial is the only proper proceeding. *Slessman v. Crozier*, 80 Ind. 487.

The fourth and fifth specifications in the assignment of errors present no question. *Truitt v. Truitt*, 38 Ind. 16; *Ray v. Detchon*, 79 Ind. 56; *Durham v. Craig*, 79 Ind. 117; *Kendel v. Judah*, 63 Ind. 291; *First Nat. Bank v. Colter*, 61 Ind. 153.

As to the third specification in the assignment of errors, viz., overruling the motion for a new trial, the fourth reason for a new trial, to wit, that the cause was not properly submitted, is not alluded to in the appellants' brief, and is, therefore, regarded as waived. The only question remaining is, was the verdict contrary to the law or to the evidence.

The agreed statement of facts shows that the will of Jeremiah Cory, containing the conditional devise hereinbefore set forth, was duly admitted to probate on June 16th, 1874, and

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that Moses Cory took possession of the land and held it under the will until June 1st, 1880; that he maintained and kept said Catherine until March 12th, 1879, and since then has wholly failed and refused, and still fails and refuses, to keep her; that on June 1st, 1880, the plaintiffs, as the heirs at law of said testator, took possession of said land, and now hold the same as such heirs; that said testator's personal estate has been finally settled. The agreed statement then recites the mortgage by Moses Cory to Johnson, on Oct. 1st, 1875, its foreclosure by Johnson, the purchase at the foreclosure sale by Johnson, the assignment of the certificate of sale to the defendant, and the execution of the sheriff's deed to the defendant on the 23d of February, 1880, all substantially as stated in defendant's counter-claim; that when Johnson took his mortgage he had no knowledge of the terms or conditions of said will except such as is implied by law from the fact that the will was duly recorded; that said Catherine was a party to said foreclosure suit, and her interests were protected by the decree therein, as stated in said counter-claim; that said Catherine is, and has been since the execution of said will, a person of unsound mind and incapable of managing her own estate; that neither said Catherine, nor any one on her behalf, has ever demanded of said Johnson or of this defendant the performance of said condition; that said Catherine resided with said Moses Cory until March 12th, 1879, and that defendant has never been in actual possession of said land; that defendant, after receiving said sheriff's deed, brought suit against said Moses Cory to recover the possession of the land, which suit was tried at the October term, 1880, of the Union Circuit Court; that Thomas Little was one of the attorneys of said Moses, employed on behalf of the other heirs of said testator, including said Catherine Cory; that, before the commencement of the present suit, and during said October term, 1880, said Little, acting for said heirs, including said Catherine, and for them asked said Moses to perform said condition, which he then and there absolutely refused to do; that said

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Little then told said Moses that said other heirs would take or continue to hold the land in controversy unless he did support said Catherine, to which he answered, "he could not help it." This was in the month of October, 1880.

There can be no doubt that Moses W. Cory held the land under the will upon a condition subsequent, and that, upon a breach of the condition, his title would be defeated and the land would revert to the heirs of the deviser, upon the exercise by them of the right of entry or its equivalent. *Cross v. Carson*, 8 Blackf. 138 (44 Am. Dec. 742); *Thompson v. Thompson*, 9 Ind. 323; *Lindsey v. Lindsey*, 45 Ind. 552. Condition broken gives the right of re-entry. *Scott v. Stipe*, 12 Ind. 74; *Leach v. Leach*, 4 Ind. 628. In Indiana, a demand of possession is equivalent to an entry on the premises. *Indianapolis, etc., R. W. Co. v. Hood*, 66 Ind. 580; *Clark v. Holton*, 57 Ind. 564.

Neglect to perform the condition does not, *ipso facto*, determine the estate, but only exposes it to be defeated and determined at the election of the grantor, and, in case of his death, his heirs, to be signified by some act equivalent to re-entry at the common law. *Ludlow v. New York, etc., R. R. Co.*, 12 Barb. 440; *Nicoll v. New York, etc., R. R. Co.*, 12 N. Y. 121. There must be a demand, on the part of the persons entitled to insist upon its performance, whether the condition consists in the payment of money, or the performance of some other act, and a refusal on the part of the person in whom the title is vested. *Lindsey v. Lindsey, supra*, *Schuff v. Ransom*, 79 Ind. 458; *Risley v. McNiece*, 71 Ind. 434, 439. In the case of *Schuff v. Ransom*, just cited, the following is the language of the court by WORDEN, J.: "The stipulations to be performed by the defendant, other than," etc., "were exclusively for the benefit of said Spaldin, and he does not appear to have made any demand of performance, which was necessary in order to work a forfeiture of the estate."

It would seem, therefore, that, in the case at bar, the proper person to make the demand was Catherine Cory, and it does

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not appear that any demand was made by her. The agreement states that Moses Cory broke the condition on March 12th, 1879; that in October, 1880, Thomas Little, acting for said heirs, including said Catherine, and for them, asked Moses Cory to perform said condition, which he then and there refused to do.

At the time this demand was made, Moses Cory was no longer the owner of the land. The agreement shows that Johnson bought the land on February 15th, 1879; that his assignee, the appellee, received the sheriff's deed on February 23d, 1880. The title of the appellee, therefore, related back to the day of sale, which was February 15th, 1879, twenty-five days prior to said alleged breach by Moses Cory. Moses Cory having ceased to be the owner of the property, and the mortgage made by him having been subject to the condition, the purchaser at the mortgage sale and his assignee, the appellee, took the land subject to the condition, and, after the appellee's title accrued, the performance of the condition devolved upon him, and any forfeiture would be by him, and not by Cory. Certainly, in such a case, the appellee would be permitted, in a court of equity, to come in and perform the condition and save the forfeiture. *Leach v. Leach, supra.*

That is substantially what the appellee in his counter-claim demands, and that alone will properly protect the interests of said Catherine, because, under the mortgage decree, the entire land is held by the appellee subject to the condition; but, if the appellants should succeed in establishing a forfeiture, they will take as heirs, and not under the will, and Catherine, instead of having the whole land bound for her support, will take only one-twelfth of one hundred acres. The circumstance of an estate being subject to a condition does not affect its capacity of being aliened, devised, or transmitted by descent, in the same manner as an indefeasible estate; the purchaser, or whoever takes the estate by devise or descent, taking it subject to whatever is annexed to it. 2 Washb. Real

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Prop., p. 456. The holder of the estate, therefore, is the proper party to perform the condition annexed to it; it is his failure which will work a forfeiture, and the demand must be made upon him before a forfeiture can take place. Although the estate be conveyed, it passes to the grantee subject to the condition, and he is chargeable with laches in relation to the non-performance of the condition. 4 Kent Com. 126; Co. Litt. 246, b. The agreed statement shows that no demand for the performance of said condition was ever made upon Johnson or upon the appellee. There is, therefore, no ground for a forfeiture, so far as the same is claimed by reason of the demand stated in the agreement. The appellants claim that even without the demand there was a re-entry sufficient to work a forfeiture. "Conditions subsequent are not favored in law; * * the rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience." 4 Kent Com. 129.

It appears from the agreed statement that the appellee never had possession of the land; that he was compelled, after receiving the sheriff's deed, to bring suit against Moses Cory for possession, which suit was tried at the October term, 1880, of the Union Circuit Court; that Thomas Little was an attorney for said Cory in said suit, and was also employed by the other heirs of the testator; and that said Little, in the month of October, 1880, acting for said other heirs, demanded of his client Moses Cory the performance of the condition, which being refused, he told Moses that said other heirs "would take or continue to hold the land in controversy unless he did support said Catherine," to which Moses replied "he could not help it."

It is elsewhere stated in the agreement, that, "on June 1st, 1880, the plaintiffs, as the heirs at law of said testator, took possession of said land, and now hold the same as such heirs."

At common law nobody but the grantor or his heirs could enter for condition broken. Co. Litt. 214 b, 218 a. The

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freehold could not pass without livery of seizin, which was a notorious act, and it required an act equally notorious, such as an entry, to revest it in the grantor or his heirs. Where the entry could not be made a claim was sufficient; but such entry or claim was required to be made for the breach of the condition, with intent to take advantage of the forfeiture, and in order to avoid the estate. 4 Kent Com. 127.

It is not alleged in the agreement that the possession of the heirs in June, 1880, was by way of entry for condition broken. The heirs evidently did not rely upon it as revesting the estate in them, because four months afterwards, in October, 1880, they by their attorney, Mr. Little, notified Moses Cory, that, unless he would support Catherine, they "would take or continue to hold the land in controversy."

We think it clear that there was no entry for condition broken in June, 1880. The inference is very strong that the possession was then taken by the consent and connivance of Moses Cory, who was defending the possession against the appellee.

The appellee's counter-claim charges fraud and connivance between Moses Cory and the other plaintiffs, in order to defeat the title of the appellee. We think there was no proof of any sufficient entry for condition broken, and, under the circumstances disclosed by the agreement, we are satisfied that the finding of the court was not contrary to the evidence, nor contrary to law.

There was no error in overruling the motion for a new trial. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

Sims *et al.* v. Smith *et al.*

No. 10,317.

SIMS ET AL. v. SMITH ET AL.

DEED.—Married Woman.—Disaffirmance by Infant Grantor.—A married woman who, prior to 1847, and when an infant, joined her husband in conveying her lands, may, if of age and there be no affirmance of the deed by her, disaffirm the conveyance at any time during her coverture. In such case, her disaffirmance matures her right to quiet her title to the land, though the intermediate estate of the grantee of herself and husband continues during the existence of the marriage relation, the husband being entitled at common law to the possession and income of her estate.

SAME.—Notice.—The conveyance of the grantee of an infant to a purchaser without notice does not affect the right of the infant to disaffirm her deed.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellants.

D. Moss, W. Neal, R. R. Stephenson and W. S. Christian, for appellees.

MORRIS, C.—The appellant Rosanna sued the appellees for the purpose of quieting her title to certain real estate in Hamilton county, Indiana.

The complaint alleges that the appellants were married prior to the 24th day of July, 1844; that on that day the appellant Rosanna was the owner of the west half of the southwest quarter of section 6, township 19 north, of range 5 east, in Hamilton county, Indiana, and that on the same day she and her husband, her co-appellant, conveyed said land, with other real estate, to one Henry Bardoner, who, by divers mesne conveyances, transferred the same by deed to the appellee Martha Smith; she avers that at the time of the execution of said deed she was a minor, under the age of twenty-one years, and that she was then, and ever since has been, the wife of her co-appellant John F. Sims; that, on the — day of March, 1881, and before the commencement of this suit, she and her husband disaffirmed said deed, and notified the appellees of the fact; that the appellees claim to be the absolute

Sims *et al.* v. Smith *et al.*

owners of said land, and deny the right of the appellants to disaffirm said deed as to the appellant Rosanna. Prayer for relief, etc.

The appellees demurred to the complaint. The demurrer was sustained, and, the appellants declining to plead further, final judgment was rendered for the appellees.

The ruling of the court upon the demurrer is assigned as error.

The facts in this case differ from those in the cases of *Sims v. Bardoner*, *ante*, p. 87, and *Sims v. Snyder*, *post*, p. 602, in this: In the latter cases it was alleged that the grantees of the appellants, and their grantees also, had notice of the fact that the appellant Rosanna was, at the time she executed the deed to Henry Bardoner, an infant and the wife of said John F. Sims; and that, when she attained her majority, she desired to disaffirm the deed, but was prohibited from so doing by her husband, who controlled her will. In the present case, no such excuse for delay in disaffirming the deed is alleged.

The question presented for decision is, has a woman who, prior to 1847, and when an infant, joined with her husband in the conveyance of her real estate, a right to disaffirm such conveyance during coverture, and before her right of entry is barred by the statute of limitations?

By the law as it stood prior to the legislation of 1847, the husband had the right to the possession and income of the wife's land during her coverture, and this right he could and did convey to Henry Bardoner in 1844. It follows, therefore, that the right of the appellant Rosanna was not barred by the statute of limitations.

We think that, in the absence of facts and circumstances which would estop the grantor, the deed of an infant may be disaffirmed by him at any time after he attains his majority and before his right of entry is barred by the statute of limitations. *Sims v. Bardoner*, *ante*, p. 87, and authorities there cited. It would seem to follow, therefore, that as, in this case,

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the right of entry was not barred, and as the complaint states no fact that could estop the appellant from disaffirming her deed, her right to do so was not unreasonably delayed, and that the demurrer to the complaint should have been overruled.

If an infant, who is also a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after the coverture is ended. 2 Bishop Married Women, sec. 516; Tyler Infancy and Coverture, p. 71; Schouler Domestic Rel., 589; *Miles v. Lingerian*, 24 Ind. 385; *Dodd v. Benthal*, 4 Heisk. 601; *Matherson v. Davis*, 2 Cold. (Tenn.) 443; *Sims v. Bardoner*, *supra*.

In the case of *Sims v. Everhardt*, 102 U. S. 300, a case precisely like this, except that the wife was abused by, and in great fear of, her husband during coverture, the court says, after criticising the case of *Scranton v. Stewart*:

“But if the law was accurately stated in the opinion given by the court in *Scranton v. Stewart*, as applicable to a deed of her lands made by an infant *feme covert* after the statute of 1852, it by no means follows that it should rule the present case. There is a radical difference in the facts of the two cases. Mrs. Sims was married before the act of 1852 or that of 1847 was passed, and while the common law relative to the marriage relation existed. By the marriage her husband acquired a vested freehold interest in her lands, and became entitled to the rents and profits. His control over the usufruct thereof became absolute. His interest extended * as long as the marriage relation continued. It was an interest capable of sale. When, therefore, the deed was made to Mrs. Everhardt in 1846, it gave to the grantee the wife’s right, subject to disaffirmance, and the husband’s right to the possession and enjoyment of the profits absolutely. When the wife subsequently came of age, she continued powerless to disturb the possession of the grantee, as long as her coverture lasted; for the grantee held not only her right, but also that

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of her husband. The most she could have done was to give notice that she would not be bound by the deed. Was she required to do that? To answer the question it is important to keep in mind her condition at common law. The land was not her separate estate, such as the wife had in *Scranton v. Stewart*. In regard to it she was *sub potestate viri*, incapable of suing or making any contract without her husband's assent. She could not even receive a grant of land if her husband dissented. Her disability during her coverture was even greater than that of an infant, and it is settled that an infant can not disaffirm his deed while his infancy continues. * * * Why should not the greater disability of coverture be attended with the same consequences?"

We have quoted the above passage because it is applicable to the case in hearing. The case of *Sims v. Everhardt* was finally decided upon its peculiar circumstances, but the whole reasoning of the court shows that it would have been held, had the exigencies of the case required it, that a married woman may avoid her deed for land made prior to 1847 or 1852, and while an infant *feme covert*, within a reasonable time after she becomes discover. In the case of *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100, the court, per Woods, J., says:

"For the proposition that an infant *feme covert* must disaffirm her deed within a reasonable time after arriving at majority, though yet under coverture, counsel seem to rely mainly upon *Scranton v. Stewart*, 52 Ind. 68, and *Miles v. Linger*, 24 Ind. 385. Those cases came recently under a careful and critical examination by the Supreme Court of the United States, in the case of *Sims v. Everhardt*, 102 U. S. 300, wherein it was held, in reference to a conveyance in this State in 1847, that a disaffirmance was good, if made within a reasonable time after the ceasing of the coverture. Some stress is laid, in the opinion, upon the fact that the case of *Scranton v. Stewart* arose upon a deed made after the laws of 1852 had taken effect, whereby the married woman was empowered to bring suits

concerning her lands, independently of the husband; but, as under those laws she was still entitled to the benefit of the disability of coverture and was not bound to sue, it would seem that no additional duty should be, on that account, imposed on her in reference to the act of disaffirmance, which must, in such case, precede the bringing of the suit. If the express giving of power to sue does not, in respect to the statute of limitations, impose the duty to sue, much less, apparently, can there be inferred, from the grant of that power, a new rule in reference to the act of disaffirmance, in respect to which the laws referred to are entirely silent."

The judge whose language we have quoted says that the point is not involved in the case, and is not, therefore, decided. But we think the language quoted is a very forcible statement of the law as applicable to the case now in hearing. In the case before us the complaint does not show that the appellant Rosanna has done anything in affirmance of her deed to Henry Bardoner, or that she has stood by, or that improvements have been made with her knowledge and assent; her right of entry has not been barred, nor has the statute of limitations yet begun to run against her; she has been under coverture from the time she executed the deed until the commencement of this suit. She is only required to disaffirm her deed in order to mature her right to recover the land. The intermediate estate of the grantee of herself and husband continues, so that, as yet, she can not sue to recover the land conveyed. Under these circumstances, we are inclined to the opinion that the disaffirmance of the deed was within the time allowed by law, and that the court erred in sustaining the demurrer to the complaint.

The appellee took, as against Rosanna, the title of his grantor only, subject to be defeated by a disaffirmance of her deed. If her grantee could, by conveying the land to one ignorant of her infancy and coverture, defeat her right to disaffirm the deed, the law could afford no protection to infants or married

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women. The conveyance of the land by her grantee did not affect her right to disaffirm the deed. *Miles v. Lingerian, supra.*

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of appellees.

No. 8295.

SCHOOL TOWN OF LEESBURGH v. PLAIN SCHOOL TOWNSHIP.

COMMON SCHOOLS. — Towns. — School Corporation. — Ownership of School-House.

— Title to Real Estate. — Trust and Trustee. —In 1849 a school district purchased and took title to two lots in the village of L., situated in the district, for the use of the district, for a school-house. Under the act of 1852, P. school township, in which was the village, took possession of the property, and held it until 1876, when the village of L. became an incorporated town, the township meantime erecting a valuable school-house thereon.

Held, that the school township was, from the taking effect of the school law of 1852, seized of the property as trustee by statute, as successor of the school district until the village became incorporated, when the school town thus created became such trustee by statute, as the successor of the township (the property being within its territory), and thereby acquired the exclusive right to its possession and control. *Carson v. State*, 27 Ind. 465, followed, and *Heizer v. Yohn*, 37 Ind. 415, and *Reckert v. City of Peru*, 60 Ind. 473, distinguished.

SAME.—Under the Constitution and laws of this State, school property is held in trust for school purposes by those authorized, for the time being, to control it; and the Legislature may at any time change the trustee.

From the Kosciusko Circuit Court.

J. S. Frazer and *W. D. Frazer*, for appellant.

H. S. Biggs, for appellee.

NIBLACK, J.—This was an action by Plain School Township, of Kosciusko county, against the School Town of Leesburgh, to settle a controversy concerning the ownership and the possession of a school-house.

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159	427
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86	582
168	100

School Town of Leesburgh v. Plain School Township.

The complaint was in two paragraphs, but before issue was joined the first paragraph was withdrawn.

A demurrer was filed to the second paragraph, and, being overruled, the defendant declined to answer further. Final judgment was thereupon rendered against the defendant, for the recovery and possession of the school-house.

We are, therefore, only required to consider the question of the sufficiency of the second paragraph of the complaint.

That paragraph stated that, on the 17th day of December, 1849, one David Rippey, who was then trustee of School District No. 2, in Plain township, in said county of Kosciusko, purchased of one Metcalf Beck the following real estate, to wit: Lots 111 and 112, in the town of Leesburgh, in said township, which said town of Leesburgh was not then an incorporated town; that the said Beck executed a deed of conveyance for said lots to the said Rippey, as such trustee of School District No. 2, in Plain township, and his successors in office forever, for the use and purposes of said school district, to be exclusively occupied by a school-house or seminary of learning; that the said Rippey paid for said lots out of the special school fund levied upon, and collected from, the taxpayers of said district for that purpose; that, upon the plaintiff becoming a corporation for school purposes, it entered into the possession of said lots under the deed of conveyance to Rippey, and continued in possession of the same uninterruptedly for the period of twenty-five years, using said lots during all that time exclusively for school purposes; that while the plaintiff was so in possession of said lots, at great expense, to wit, the sum of \$7,000, it made valuable and lasting improvements thereon, by erecting a large and commodious school-house to be used and occupied exclusively for school purposes; that the expenses incurred in the erection and construction of said school-house were paid out of the proceeds of a special tax levied upon and collected from the taxable property of all the people and taxpayers of said Plain School Township for that purpose; that all of said expenses so in-

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curred have been paid except the sum of \$700, which remains a valid debt against the plaintiff; that afterwards, to wit, on the 20th day of June, 1876, a corporation, called The Town of Leesburgh, was organized within the territorial limits of said Plain School Township; that said lots and school-house are embraced and included within the corporate limits of said incorporated town of Leesburgh; that school trustees have been elected for said town of Leesburgh, who have wrongfully taken possession of said lots and school-house, and have unlawfully kept the plaintiff out of possession for two years then last past; that more than three-fourths of the territory constituting School District No. 2, at the time of the purchase of the lots by Rippey, lies outside of the corporate limits of the School Town of Leesburgh, and still remains within the limits of Plain School Township, and that only a small portion of said township is included within the School Town of Leesburgh.

Upon this statement of facts the plaintiff claimed to be the owner, and demanded the possession, of the lots and school-house. By the school laws, in force at the time Rippey purchased the lots in controversy, each school district constituted a separate and distinct school corporation, and was authorized to acquire real estate by any of the usual methods, and to hold the same for the use of schools of the district. R. S. 1843, p. 265, section 198; p. 310, section 41.

By the act of June 14th, 1852, each civil township was created and declared to be a school corporation, and all the duties, which the trustees of school districts had theretofore been required to perform, were devolved upon the township trustees. Each city and incorporated town of the State was also created, and declared to be, a school corporation independent of the township in which it might be situated, and entitled, through trustees elected or appointed for that purpose, to control all educational affairs pertaining to public schools within its territorial limits. The townships, incorporated towns and cities were respectively placed in charge of the school-houses and other property belonging to the public schools which fell

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within their jurisdiction, and, by operation of law, such townships, incorporated towns and cities became the successors as school corporations of the school districts throughout the State. 1 R. S. 1852, p. 439, sections 4, 8, 10, 32, 132.

These provisions of the act of 1852 were substantially reenacted and continued in force by the acts of March 5th, 1855, 1 G. & H. 542, and of March 6th, 1865, 1 R. S. 1876, p. 778, respectively. Assuming the allegations of the complaint to be true, as the demurrer admitted them to be, the appellee never had any title to the lots beyond the possession of them as a merely statutory trustee succeeding the school district represented by Rippey, the *cestuis que trust* being the persons entitled to attend the public schools, which were from time to time kept in houses erected or placed on said lots. When the appellant, the School Town of Leesburgh, was incorporated, it became the successor of the appellee in all educational matters within the territorial limits of such town, and as much a separate and distinct school corporation as was the appellee over the territory of the township which remained within its jurisdiction.

The appellant, therefore, succeeded, as a newly created statutory trustee, to the management and control of the schoolhouse situate upon the lots in suit, upon the principle that it fell within the territorial jurisdiction of the town, from which the authority of the appellee as a school corporation was excluded, and was a public school building to which no other school corporation had any lawful claim or adverse title. *State, ex rel., v. Shields*, 56 Ind. 521. Counsel for the appellant rely very much in argument upon the case of *Carson v. State*, 27 Ind. 465, as supporting their claim to a reversal of the judgment below. On the other hand, it is insisted that the subsequent cases of *Heizer v. Yohn*, 37 Ind. 415, and of *Reckert v. City of Peru*, 60 Ind. 473, overrule that case, and fully sustain the decision below overruling the demurrer to the complaint.

These later cases are apparently inconsistent with the first

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named case in some material respects, but in those cases the legal title, resting upon deeds of conveyance, was in the respective townships, and in that particular this case differs from each of those. How far this difference constituted a material difference as between this and all of those cases, we will not now attempt to decide. Nor do we think it necessary now to enter upon a review of those cases. That can better be done in some case more nearly in line with some one of those cases than this one is. The case of *Carson v. State* formulates one abstract proposition which seems not to have been disapproved, and which appears to us to be applicable to this case, and that is that, "Under the Constitution and laws of this State, school property is held in trust for school purposes by the persons or corporations authorized for the time being by statute to control the same. It is in the power of the Legislature, at any time, to change the trustee."

The long continued possession of the school-house in question by the appellee as a school township, and the expenditure of large sums of money upon it for school purposes, conferred no new or additional title or claim to it upon the appellee. That possession and those expenditures were presumably for the benefit of the *cestui que trust*, or the class of persons now represented by the appellant, and were in no manner inconsistent with the present claim of the appellant to the possession of the school-house. By the proper transfers, all the school children of the vicinity can be permitted to attend school at the school-house, as they might have done before the appellant became a separate school corporation.

If, as claimed, the taxable property within the town of Leesburgh can not be made to pay its fair proportion of the indebtedness still resting on the township on account of the school-house, that suggests a defect in existing laws which can, and perhaps ought to, be remedied by additional legislation, but does not affect the question as to which school corporation is entitled to the possession of the lots and school buildings. In making expenditures of public moneys upon school-

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houses, township and other school trustees are expected to take ordinary future contingencies into account, and to give attention to the title of the ground on which school buildings are erected. 1 R. S. 1876, *supra*, p. 813, sec. 157. Inattention to such considerations may, and doubtless often does, entail losses for which the courts can afford no adequate remedy.

The conclusion we have reached is that the court below erred in overruling the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

No. 10,731.

CITY OF INDIANAPOLIS v. MCAVOY.

CITIES.—Annexation of Territory.—Cities can not annex territory not contiguous thereto.

SAME.—Illegal Taxes.—Recovery of.—If taxes be assessed and collected by a city on lands illegally annexed to the city, they may be recovered.

SAME.—City Boundaries.—Question of Fact.—It is a question of fact whether or not a particular locality is within the limits of a city.

SAME.—Refunding Taxes.—Statutory Construction.—Mandatory or Permissive.—The statutory provision (sec. 3157, R. S. 1881) that “the common council may, at any time, order the amount erroneously assessed against and collected from any taxpayer to be refunded to him,” is mandatory.

MISTAKE.—Money Paid.—Negligence.—Money paid under a mistake of fact may be recovered, notwithstanding a negligent failure to use the means of knowledge. *Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312, disapproved.

MANDAMUS.—Practice.—A remedy by mandate can not be had when the ordinary action affords complete relief.

From the Superior Court of Marion County.

C. S. Denny, for appellant.

W. F. Elliott, for appellee.

WOODS, C. J.—The appeal is from a judgment in favor of the appellee upon a complaint to recover money paid in dis-

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125	250
86	587
142	493
142	515
142	520
86	587
148	37
152	448
86	587
168	250

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charge of illegal taxes assessed against property of the appellee. The error assigned is upon the overruling of the demurrer to the reply for want of facts. The substance of the pleadings may be briefly stated:

The complaint charges that since the year 1875 the appellee has been the owner of lots 25, 26, 44 and 45, in Staunton and Francis' addition to the city of Indianapolis; that, in 1874, the common council of the city passed a resolution for the annexation of certain territory, including said lots, to the corporate limits of the city, and thereafter assessed and put upon its tax-duplicates taxes upon said lots for the use of the city, to wit, for the years from 1875 to 1881 inclusive; that believing the annexation to have been legally made, and the taxes properly assessed, the appellee paid the same, to the aggregate amount of \$67.35; that, in fact, said lots are not and never were contiguous to the city, nor to any territory annexed thereto, but a half mile therefrom, and in April, 1881, after the payment of the taxes aforesaid by the plaintiff, the common council of the city enacted an ordinance and resolution declaring the proceedings of annexation illegal and void, because the lots were not contiguous to the city; and then for the first time the plaintiff learned that her lots were not contiguous to the city, and the annexation thereof void; that no improvements were made in the vicinity of said lots, and no benefit received from the city government; that, upon demand made, the defendant had refused to repay the moneys so illegally collected.

The only allegation of the answer, not denied in the reply, material to note, is, that the boundary lines of the city were well defined by ordinances duly recorded in the office of the city clerk, and there kept open to the inspection of the appellee, all the time a resident of the city. In reply, it is alleged that the appellee paid the taxes in ignorance of the facts, and believing the lots to be within the city.

The judgment of the superior court, we think, was clearly

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right. The invalidity of the order of annexation was conceded by the city council, and is not disputed now; the taxes assessed against the property of the appellee were, therefore, illegal, and are shown to have been paid by the appellee in ignorance of the fact which rendered the annexation invalid, that is to say, the fact that the annexed territory was not adjoining or contiguous to the city. 1 R. S. 1876, pp. 310, 311, sections 84, 85. The case, then, is one of payment of an illegal tax, under a mistake of material fact, and not of law merely. That it is a question of fact whether a particular locality is or is not within the limits of a city, see *Grusenmeyer v. City of Logansport*, 76 Ind. 549.

But it is claimed on the authority of *Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312, that the appellee had the means of knowing the location of her lots in respect to the city boundary, and consequently that she is not entitled to relief. The proposition is too broadly stated. The rule indicated certainly can not apply unless the means of knowledge are present, or so easily accessible and convenient that the failure to use them would constitute negligence, and such negligence as under the circumstances ought to preclude relief. See *McArthur v. Luce*, 43 Mich. 435; S. C., 38 Am. R. 204. In the case of *Brown v. College Corner, etc., Gravel Road Co.*, 56 Ind. 110, it is held, inconsistently with the statement on the subject found in the opinion in *Lafayette, etc., R. R. Co., supra*, that the failure to use means of knowledge does not preclude a recovery. See, also, to same effect, *Kerr Fraud and Mistake*, 415; *Grimes v. Blake*, 16 Ind. 160; *Lewellen v. Garrett*, 58 Ind. 442 (26 Am. R. 74); *Mayer v. Mayor*, 63 N. Y. 455; *Union Nat'l Bank v. Sixth Nat'l Bank*, 43 N. Y. 452; S. C., 3 Am. R. 718.

It is insisted by the appellee, that, after the city council had declared the annexation illegal and void, the appellee was entitled to recover just as for money paid on a judgment which had afterwards been reversed, and the following cases are cited: *Martin v. Woodruff*, 2 Ind. 237; *Bank of U. S. v.*

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Bank of Washington, 6 Peters, 8; *Peyser v. Mayor*, 70 N. Y. 497 (26 Am. R. 624); *Mayor, etc., ads. Riker*, 9 Vroom, 225; S. C., 20 Am. R. 386; *Jersey City v. O'Callaghan*, 41 N. J. L. 349. We decide nothing on this point.

There is, however, another ground on which the appellee was entitled to recover, even though it were conceded that the payments in question were voluntary, and made without mistake of fact. It is expressly provided in the law governing cities, 1 R. S. 1876, p. 298, section 59 (R. S. 1881, section 3157), that "the common council may, at any time, order the amount erroneously assessed against and collected from any taxpayer to be refunded to him." This language is in form permissive, but in legal effect it is mandatory. *Potter's Dwarris Statutes*, 220; *Smith Const. Constr.*, sec. 599; *Supervisors v. U. S.*, 4 Wal. 435; *State, ex rel., v. Board, etc.*, 36 Wis. 498; *Gray v. State, ex rel.*, 72 Ind. 567; *Board, etc., v. Benson*, 83 Ind. 469.

The appellant insists that if this provision is applicable to the case the remedy should have been by mandate, and not by the ordinary action. We do not think so. On the contrary, the general rule is that a resort may not be had to the extraordinary remedies provided by the code, such as injunction or mandate, if adequate relief may be had in an ordinary action; and there is no reason why that action is not available in such a case as this. The case of *Georges' Creek Coal and Iron Co. v. County Commissioners, etc.*, decided by the court of appeals of Maryland, at its October term, 1882, and found in *The Reporter*, vol. 15, p. 271, is fully in point. See, also, *People v. Brooklyn*, 1 Wend. 318; S. C., 19 Am. Dec. 502; *Board, etc., v. State*, 11 Ind. 205; *State, ex rel., v. Board, etc.*, 63 Ind. 497; 2 *Dillon Mun. Corp.*, sections 935, 947. Judgment affirmed.

ELLIOTT, J., did not participate in this decision.

No. 10,023.

HUFFMAN ET AL. v. CAUBLE.

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144	205
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154	156

TITLE BOND.—*Executory Contract.*—*Action for Purchase-Money.*—*Pleading.*—

Insolvency.—*Lien.*—In a suit by a vendor to enforce a lien for purchase-money against land, where he has given a title-bond for the conveyance thereof, it is not necessary, under section 275, R. S. 1881, to aver the insolvency of the purchaser.

JUDGE.—*Jurisdiction.*—*Change of Venue.*—*Practice.*—Where, upon a change of venue for bias of the judge, another judge is appointed to try the cause who does so without objection, it is too late afterwards to make a question as to his jurisdiction.

SAME.—*Trial.*—*Discretion of Judge.*—*Right to Question Witnesses.*—A judge presiding during the trial of a cause is more than a mere moderator between contending parties; he is charged with the grave duty of maintaining truth and preventing wrong, and, to this end, has a large discretion, which, if exercised without abuse, will not be error. He may propound proper questions to witnesses, with a view to elicit the facts; and if they be leading questions it is not available error.

SAME.—*Instructions.*—*Stating Evidence.*—In instructing the jury the judge may state the evidence, if he tell the jury that they are to determine what it proves; but he must not tell them that certain facts in issue are proved, or assume them to be true.

PAYMENT.—*Application.*—A debtor owing his creditor several demands has a right, when he makes a payment, or at any time after and before the creditor has applied the payment, to direct upon which of the several demands it shall be applied.

SAME.—One having received credit for a payment, in a suit against him on a note, can not receive credit again in another suit upon a different demand, by showing that the judgment recovered in the former suit was for too large a sum.

SAME.—*Settlement.*—A settlement, in the absence of fraud or mistake, concludes the parties, not as to all dealings not expressly excluded, but only as to such as they intended to settle.

PROMISSORY NOTE.—*Contract.*—*Sale.*—A party purchasing property at an agreed price, and giving his note therefor, can not maintain a defence upon the ground merely that he agreed to pay too much.

VENDOR AND VENDEE.—*Deed.*—*Tender.*—*Demand.*—Where a deed is tendered by the vendor under an executory contract, and the unpaid purchase-money demanded, and the vendee answers that he has no money, it is not necessary to state the exact amount demanded.

From the Washington Circuit Court.

Huffman *et al.* v. Cauble.

H. Heffren and J. A. Zaring, for appellants.

S. B. Voyles and H. Morris, for appellee.

BICKNELL, C. C.—Peter C. Cauble, in the year 1875, agreed to sell land to Mary A. Huffman, wife of John Huffman, for \$2,500. He put Mrs. Huffman in possession, and gave her and her husband a bond conditioned for the conveyance of the land to her, upon payment to him by said Huffmans of \$2,500 and interest, on or before October 5th, 1879. Part of the purchase-money was paid. For the remainder, \$1,500, Huffman and wife gave Cauble their joint note, dated October 5th, 1875, and payable four years after date, with interest payable yearly.

In 1880, Cauble brought this suit against Huffman and wife, to enforce his lien for the purchase-money, under section 791 of the civil code of 1852, which is as follows:

“In any action brought for the recovery of the purchase-money against any person holding a contract for the purchase of lands, the party bound to perform the contract, if not plaintiff, may be made a party, and the court, in the final judgment, may order the interest of the purchaser to be sold or transferred to the plaintiff upon such terms as may be just; and may also order a specific performance of the contract in favor of the complainant or the purchaser, in case a sale be ordered.”

This statutory lien is not the vendor's lien established by the court of chancery. That lien arises only when the vendor has parted with his title. *McCaslin v. State, ex rel.*, 44 Ind. 151. And it differs from the statutory lien in two particulars, to wit: The equitable vendor's lien is waived by taking a mortgage upon other lands, or by taking the note of the vendee with surety. *McCaslin v. State, ex rel., supra*; *Boon v. Murphy*, 6 Blackf. 272. And the equitable vendor's lien can not be enforced as to subsequent purchasers from the vendee for a valuable consideration without notice. *Aldridge v. Dunn*, 7 Blackf. 249 (41 Am. Dec. 224). But the statutory

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lien, under section 791, *supra*, is not waived by taking a mortgage or other collateral security, the presumption being that when the vendor retains the title he means to hold it as security for the purchase-money. *McCaslin v. State, ex rel., supra*. And in that case a purchaser from the vendee can not be regarded as a purchaser without notice, because he might have learned of the existence of the lien by examining the title of his vendor. *Amory v. Reilly*, 9 Ind. 490.

The complaint in this case states the contract of sale, the execution of the title bond and note; that the note is due and unpaid; that after it was due, and before suit brought, the plaintiff tendered to said Mary Huffman a deed for the land, and demanded the purchase-money due, which she refused to pay; that said deed was a conveyance in fee simple, duly executed and acknowledged by the plaintiff; that said John Huffman has no property subject to execution, and is insolvent. No personal judgment is demanded.

The fifteenth assignment of error alleges that the complaint does not state facts sufficient to constitute a cause of action; the objection made is, that the complaint nowhere alleges that Mary Huffman has no other property.

Formerly, in a bill to enforce a vendor's lien, such an averment was necessary, in order to show that there was no remedy at law. *Bottorf v. Conner*, 1 Blackf. 287; but it is not necessary now; the want of it affects the form of the judgment, nothing more. *Scott v. Crawford*, 12 Ind. 410; *Bowen v. Fisher*, 14 Ind. 104; *Stevens v. Hurt*, 17 Ind. 141. In the present case, such an averment would be mere surplusage; there could be no personal judgment against Mrs. Huffman; she being a married woman, her note was void, but that does not prevent the enforcement of the lien for purchase-money. *Haugh v. Blythe's Ex'rs*, 20 Ind. 24; *Perry v. Roberts*, 30 Ind. 244. The complaint was sufficient; its allegations, except as to the coverture, are substantially the same as those of the complaint in *McCaslin v. State, ex rel., supra*.

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The defendants answered separately, by a general denial, and there was an agreement, that under said answers "all defences and matters in rebuttal might be given in evidence, the same as if specially pleaded."

The issues were tried by a jury, who found for the plaintiff, with \$1368.73 damages. The court overruled the defendants' motion for a new trial, and rendered judgment for the plaintiff for the sale of the land to satisfy his said claim and costs, and that upon such sale the defendants be foreclosed, etc. The defendants appealed.

There are sixteen errors assigned; the sixteenth is, that Judge Wilson had no jurisdiction to try the cause, because he did not appear at the time assigned for trial, and that when he appeared afterwards, at the next term of the court, the cause had not been reassigned to him. The record shows that Judge Wilson, upon an affidavit for a change of judge, made by the defendants, was duly appointed to try the cause, and that the cause proceeded before him to final judgment without any objection to his jurisdiction. Such an objection, made now for the first time, is too late.

The first thirteen errors assigned present matters which occurred upon the trial, and might be properly alleged as reasons for a new trial, but are not proper in an assignment of errors. *Smith v. Harris*, 76 Ind. 104.

The fifteenth alleged error having been already considered, the only remaining specification of error is the fourteenth, to wit: That the court erred in overruling the defendants' motion for a new trial.

The following are the reasons urged for a new trial:

1. The verdict is contrary to and not sustained by the evidence.
2. The verdict is contrary to law.
3. Error in the instructions numbered 4, 5, 6 and 8, given by the court of its own motion.
4. Error in refusing to give instructions Nos. 3, 4, 5 and 6, asked for by defendants.

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5. Error of the court in taking the defendant John Huffman from the hands of the plaintiff's attorneys, and examining him before the jury, and putting illegal, improper and irrelevant questions to said John Huffman, who was a legal and competent witness, and who had been duly sworn to testify in said cause in said court, in this: That said court, among other things, asked of said John Huffman, witness for the defendants, the following question, namely: "What was your intention as to settling all accounts between you and plaintiff, when you settled the matters you speak of at your house, in the bottom, near Sparksville, Ind., on the 7th day of October, 1875?" All of which was objected to at the time, but the court persisted in putting other leading, illegal and improper questions to said John Huffman.

The appellants' counsel, in their brief, say, as to the first and second reasons for a new trial, that the bond was inadmissible, because the lands therein described are different from the lands described in the complaint and in the deed tendered, and, therefore, there was no sufficient tender, so that the evidence failed to establish one of the material allegations of the complaint. This is all they say upon that subject. The answer to it is that, in fact, the complaint and the bond and the deed tendered described substantially the same land. There was, therefore, nothing in this objection which shows that the verdict was not sustained by the evidence, or is contrary to law.

So far as the fifth reason for a new trial alleges general misconduct of the judge, without stating particulars, it amounts to nothing. It specifies one question only claimed to be improper. Evidence having been given of a settlement between the defendant Huffman and the plaintiff, and Huffman being under examination as a witness for the defendants, the court asked him what his intention was in that settlement, as to settling all accounts between him and the plaintiff? This, the appellants claim, was wrong.

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A circuit judge presiding at a trial is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties. In order to establish justice and maintain truth and prevent wrong, he has a large discretion in the application of rules of practice, and his action in this respect will not be reversed by this court, unless it exhibits an abuse of discretion resulting in injustice. *Ferguson v. Hirsch*, 54 Ind. 337; *Blizzard v. Applegate*, 77 Ind. 516. In *Lefever v. Johnson*, 79 Ind. 554, this court said: "There is nothing wrong in the court's asking the witness any question the answer to which would likely throw any light upon his testimony." And it has been held that it is always within the discretion of the judge to put a leading question. 1 Greenl. Ev., secs. 242, 243, Redf. ed.

The only objection made to the question now under consideration was the following: "Counsel for defendant objected to the court propounding the question, because there were plenty of lawyers to represent the plaintiff, without the aid of the court, and because it tended to prejudice the defence." The court committed no error in overruling these objections.

As to the third reason for a new trial, the fourth instruction given by the court of its own motion is as follows:

"You have learned from the testimony in this case, that these parties had another transaction, relating to other real estate; that other transaction was in 1870, and consisted in the sale of land by plaintiff to Mary A. Huffman, the execution of a deed to her, and taking from her and John Huffman five several promissory notes, amounting in the aggregate to \$5,500, due from year to year respectively, until all became due, and bearing interest at 8 per cent. per annum. You also were informed by the evidence, that, in the year 1875, defendants conveyed to plaintiff certain lands at and for the price of \$6,310, which was to be applied in payment of said five notes. In 1875 a computation of the interest and prin-

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cipal due upon said five notes was made or caused to be made by plaintiff, and the interest due upon said notes was each credited as paid, and the first and second of said notes delivered up to the defendants, and an additional credit of \$700 placed on the third of said notes, in this way giving defendants, as plaintiff insists, full and proper credit for said sum of \$6,310. It is also in evidence, that subsequent to this crediting of the \$6,310, the plaintiff instituted suit upon said unpaid notes against these defendants and others, and at the present term of court obtained a decree therein for the sale of said lands to pay the amount therein found due. Defendants now insist, that in making and giving said credits, and in making a computation of the amount due upon said five notes, an error or mistake occurred, or some kind of fraud was perpetrated upon defendants, by reason of which they have been damaged, and they ask to have a credit in this suit therefor. Whatever defence, arising out of any error, mistake, or fraud in settlement of the five notes, would have been available for defendants in the suit upon those notes, but not in this case. Whatever might be found due defendants, if anything, by reason of any supposed error, mistake, or fraud in settling those notes, would go to reduce the amount for which the land in that case is to be sold, and would enure to the benefit of the present owners of the land in that case. The court has undoubted power, in a proper case, to correct errors and mistakes, but it must be done in the transaction in which the error or mistake occurred. To give the defendants any credit in this case would not be to correct any error that may have occurred in the other case; for whatever we might do here and in this case, in the way of giving credit, would not be to correct any error or mistake made in the other case, for whatever error or mistake there might be in the other case would still remain uncorrected. So you can not allow defendants any credit herein on account of any supposed error or mistake or fraud in the transactions of the parties, relating to the other case."

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In this instruction the court substantially told the jury that where a suit is brought by a payee against the maker of a note, and judgment has been rendered thereon in favor of the plaintiff, such judgment, until reversed, is final, and the defendant can not, in a subsequent action against him by the same plaintiff, upon another note, given for another consideration, prove that the said judgment ought to have been for a less amount, and then have the difference credited by way of set-off in the subsequent action. There was no error in this. A defendant in an action on a note can not be permitted to show that all or any part of a judgment, previously rendered against him in favor of the same plaintiff, in a former suit, on a different cause of action, was wrong, and that all or part of the sum recovered should be a credit for him in the existing suit. *Gavin v. Graydon*, 41 Ind. 559; *Turner v. Allen*, 66 Ind. 252.

The cases of *Brown v. College Corner, etc., G. R. Co.*, 56 Ind. 110, and *Lewellen v. Garrett*, 58 Ind. 442 (26 Am. R. 74), cited by appellants, were cases of mistakes in settlements where no judgment had been rendered. They are not in point. The appellants further object to this instruction because it assumes the existence of certain facts. This a court has no right to do. It may recapitulate the testimony, but in so doing must not state what is proved, but only what the testimony conduces to prove, and must tell the jury that they are to determine what is proved. *Ball v. Cox*, 7 Ind. 453; *Shank v. State, ex rel.*, 25 Ind. 207; *Reynolds v. Cox*, 11 Ind. 262; *Staats v. Burke*, 16 Ind. 448; *Black v. Duncan*, 60 Ind. 522. The instruction under consideration was erroneous, because in it the court assumed the existence of facts in controversy, and substantially told the jury that such facts had been proved.

Instruction No. 5 is as follows:

“There is another claim made by defendants: That a certain credit, endorsed upon one of the five notes, for \$556.85 was erroneously placed upon said note; that the said \$556.85

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was in fact paid upon the note in suit, and that the defendants directed it to be applied upon the note in suit. Where a party holds more than one debt against another, and he receives in payment money or property, he has the right to apply said payment to his debt which is due, rather than upon a debt not due, unless at the time of receiving such money or property in payment the party making such payment directs upon which debt it shall be applied, and in such a case the party making the payment has the right to control the application of the payment; but this direction must be given at the time the payment is made and received, and not afterwards. If, in this case, the plaintiff from time to time received money or property to the amount of \$556.85, and afterwards made a settlement with defendants to ascertain the amount of such payment, and if then, for the first time, defendant directed said credit to be placed upon the note in suit, such direction would in such case come too late, as the plaintiff had already received the payment without such direction. So, if the defendants, Huffman and Huffman, knowingly receive and accept a credit for said sum of \$556.85, they can not, in this case, get another credit for the same payment."

There was no error in telling the jury that if the Huffmans had knowingly received and accepted a credit in the other suit for a certain payment, they could not, in this suit, obtain another credit for the same payment; but the instruction under consideration did not correctly state the law in reference to the application of payments. The error consisted in telling the jury that the direction by the debtor as to the application of the payment must be made at the time of the payment, and that, if made afterwards, it would be too late. The law is that when a payment is made the debtor may direct its application, and that direction will bind the creditor; if the debtor, then, gives no direction, the creditor may apply the payment to any of the debts, and then the debtor can not, afterwards, change the application on a final settlement; but

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a direction as to the application of the payment will bind the creditor, if it be given at any time before an application of the payment has been actually made by him. In this respect the court erred in its instruction No. 5.

The sixth instruction given by the court is as follows:

“6. Where parties have dealings, and meet for the purpose of settling between themselves such dealings, and do make such settlement, all transactions between them not expressly excluded from such settlement, or omitted by mistake or fraud, are deemed to be embraced and merged in such settlement; and a party seeking to go behind any such settlement must show by a preponderance that something was omitted from said settlement by agreement, or by mutual mistake, or by fraud.”

This instruction was erroneous. The propositions it contains are not true of every settlement of dealings; they are true only when the settlement embraces all the dealings between the parties, and is intended as a settlement of all.

The eighth instruction given by the court is as follows: “A party who buys property and gives his note for the purchase-money can not defend against said note on the ground that he agreed to pay too much for the property. The law affords him no remedy in such a case.” There was no error in this.

As to the fourth reason for a new trial, the fourth instruction asked for by the defendants was properly refused. It was not necessary, Mrs. Huffman having said at the time of the tender that she had no money, to state the precise sum demanded. The unqualified reply, “I have no money,” when a proper deed is tendered and the purchase-money demanded, dispenses with a statement of the exact amount. *Bartlett v. Adams*, 43 Ind. 447.

The third and fifth instructions asked for by the defendants were properly refused, because they, if given, would have authorized the jury to enquire into matters which were settled in the former suit.

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The sixth instruction asked for by defendants was properly refused, because it declared that, although the defendants were credited with a certain payment, and had received the benefit thereof on another note, they were entitled to be credited again with the same payment in this suit. For the errors of the court in its instructions Nos. 4, 5 and 6, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee; and this cause is remanded for a new trial.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellee claims that the facts assumed by the court as proved, in its instruction No. 4, were not disputed; but they were material facts not admitted, and the jury were to determine whether they were proved or not. Instead of leaving these facts to the jury, the court told the jury they were proved. In this the court was clearly wrong. *Killian v. Eigenmann*, 57 Ind. 480. In *Matthews v. Story*, 54 Ind. 417, this court said: "It is very clear that a court has no power to state to a jury what facts are proved, nor to so state what facts are admitted by the parties, unless they are so admitted as facts to go to the jury as proof."

The sixth instruction laid down, as a rule governing all settlements, a rule applicable only to settlements of all the dealings between the parties, if that instruction had been preceded by this, "if you find that the settlement between these parties was a general settlement of all their dealings, then the following rule applies," it would have been unobjectionable; as it stood it was clearly erroneous.

The fifth instruction misstated the law as to the application of payments, by telling the jury that a direction by the debtor as to the application of a payment, in order to be effectual, must be made at the time of the payment; whereas the law is,

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that such a direction will bind the creditor, if it be given at any time before an application of the payment has actually been made. This is not denied by the appellee in his petition for a rehearing, but he says that the question of application of payments was really not in the case, and that therefore the instruction could do no harm.

In this the appellee is in error; the claim of the defendants was, that \$565 had been paid by them and had been directed by them to be applied upon the note in suit. It therefore became the duty of the court to state to the jury the law upon the application of payments, and it was stated incorrectly.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

No. 10,316.

SIMS v. SNYDER ET AL.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, W. R. Fertig, H. Dailey and W. N. Pickerill, for appellant.

D. Moss, W. Neal, R. R. Stephenson and W. S. Christian, for appellees.

MORRIS, C.—The facts stated in the appellant's complaint in this case are substantially the same as in the case of *Sims v. Bardoner*, *ante*, p. 87, except that the appellee is alleged to be a remote grantee of Henry Bardoner, to whom the appellant conveyed in 1844. It is alleged that the appellee and his grantors, including said Henry Bardoner, knew at the time that each obtained title, that the appellant was, at the time she and her husband conveyed to Henry Bardoner, laboring under the disabilities of infancy and coverture.

Upon the authority of the case of *Sims v. Bardoner*, just decided, we conclude that the court erred in sustaining the demurrer to the complaint in this case.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the cost of the appellee Peter Snyder.

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2. *Same.—Evidence of Funds.*—In a suit upon a city order, it is not necessary, to entitle the holder thereof to recover, that he should show that the city treasurer had funds with which to pay it, or that he endorsed it "not paid for want of funds." *Ib.*
3. *Same.—Water-Works Trustees.—Authority to Issue City Orders.—Statute Construed.*—Under sections 3272 *et seq.*, R. S. 1881, the board of water-works trustees of a city, and not the common council, are the proper officers to audit, allow and direct the payment of claims against the water-works; but for debts incurred for water furnished a city, prior to the appointment and qualification of a board of water-works trustees, under section 3270, the common council may rightfully issue warrants on the city treasurer. *Ib.*
4. *Pleading.—City Warrant.—Taxes.—Demurrer.*—Where, in an action upon a city order by the holder, the city answers, by way of set-off, that he is indebted to the city for taxes in a certain sum, but fails to allege any facts showing his or his property's liability to taxation, or the city's authority to levy and collect taxes, such answer is insufficient on demurrer. *Connersville v. Connersville, etc., Co., 235*
5. *Same.—Contract.—Consideration.*—A city order on its treasurer for the payment of money is a contract; and, in an action thereon by the holder, a plea of want of consideration is good. *Ib.*
6. *Municipal Corporation.—Construction of Public Works.*—A municipal corporation may construct ordinary public works through its officers and servants in cases where the whole expense is to be paid out of the corporate treasury, and is not bound to let such work out to independent contractors. *Platter v. Seymour, 323*
7. *Same.—Liability for Torts of Servants.*—Where the servants of a municipal corporation, engaged in the service of the corporation, and in the construction of an authorized corporate work, commit a trespass, the municipality is liable. *Ib.*
8. *Same.—Consequential Injuries.*—A municipal corporation is not liable for consequential injuries arising from the performance of a public work where there is no want of skill or lack of care. *Ib.*
9. *Officers.—Street.—Negligence.—Obstruction.—Notice.—Presumption.*—City officers must exercise reasonably active vigilance to keep streets in a safe condition, and where a dangerous obstruction has existed for months notice of it will be presumed. *Evansville v. Witter, 414*
10. *Same.—Excessive Damages.*—One thousand dollars, in a suit against a city to recover for a personal injury received in consequence of an obstruction upon a sidewalk, are not excessive damages where such injury confined the plaintiff to his room for sixteen weeks, required him to use crutches three months more, caused him great pain for a longer period, rendered entire recovery doubtful, and entailed considerable expense for medical aid and nursing. *Ib.*
11. *Same.—Complaint.—Diligence.—Arrest of Judgment.—Notice.*—A complaint in such action, which describes the street, the obstruction and the injury, and states facts which show that the city, if diligent in the discharge of its duty, would have had notice of the obstruction, is good on motion in arrest of judgment. *Ib.*

12. *Same.*—*Argument of Counsel.*—*Misconduct.*—*Instruction.*—*Harmless Error.*
—Upon the trial, in such action, it is error to permit counsel for the plaintiff, over objection, in argument to the court, in the presence of the jury, upon the question of the measure of damages, to read extracts from reported cases, showing large damages held not excessive; but such error is cured by a direction of the court to the jury to the effect that the case before them must be determined upon the evidence, uninfluenced by the damages given in other cases. *Ib.*
13. *Street.*—*Sidewalk.*—*Negligence.*—*Pleading.*—A complaint against a city to recover for an injury in consequence of a defective sidewalk, averring that the sidewalk had been negligently left out of repair and dangerous for two months, of which the city had notice; that when walked upon it tipped, because its support had been washed away, in consequence of which the plaintiff, in passing, without fault, and being ignorant of danger, slipped and fell, etc., sufficiently shows care by the plaintiff and negligence by the defendant. *Washington v. Small, 462*
14. *Same.*—*Degree of Vigilance.*—A city is bound to use active vigilance to discover and repair defects in its streets and sidewalks, while the traveller must use ordinary care to avoid injury. *Ib.*
15. *Corporate Powers.*—*Water-Works.*—*Contract with Water Company.*—The act of March 25th, 1879, to authorize cities and incorporated towns to construct, maintain and operate water-works, etc. (secs. 3265 to 3285, R. S. 1881), does not repeal either in terms or by implication the 26th clause of sec. 3106, R. S. 1881, which provides, in effect, that the common council of an incorporated city may authorize any incorporated company or association to construct water-works, and that, in such case, the city may become part stockholder in any such company or association. Therefore, the contract of the city with the water company is not *ultra vires* and void. *Vincennes v. Callender, 484*
16. *Annexation of Territory.*—Cities can not annex territory not contiguous thereto. *Indianapolis v. McAvoy, 587*
17. *Same.*—*Illegal Taxes.*—*Recovery of.*—If taxes be assessed and collected by a city on lands illegally annexed to the city, they may be recovered. *Ib.*
18. *Same.*—*City Boundaries.*—*Question of Fact.*—It is a question of fact whether or not a particular locality is within the limits of a city. *Ib.*
19. *Same.*—*Refunding Taxes.*—*Statutory Construction.*—*Mandatory or Permissive.*—The statutory provision (sec. 3157, R. S. 1881) that "the common council may, at any time, order the amount erroneously assessed against and collected from any taxpayer to be refunded to him," is mandatory. *Ib.*

CITY TREASURER.

See CITY, 1 to 5.

CITY WARRANT.

See CITY, 1 to 5; TAXES.

COLLATERAL ATTACK.

See JUDGE, 2, 3.

COLLATERAL SECURITY.

See INSURANCE.

COMMERCIAL PAPER.

See PROMISSORY NOTE, 2, 3, 11, 13 to 17.

COMMON LAW.

See DECEDENTS' ESTATES, 1; PRESUMPTION.

COMMON SCHOOLS.

See COUNTY SUPERINTENDENT; SCHOOL LAW; TOWN, 2 to 4, 6, 7.

COMMON PLEAS COURT.

See JUDGMENT, 8.

CONCLUSIONS OF LAW.

See SHERIFF, 1; SPECIAL FINDING; VENIRE DE NOVO.

CONFIDENTIAL COMMUNICATIONS.

See HUSBAND AND WIFE, 1.

CONDITION SUBSEQUENT.

See DEED, 4, 5; REAL ESTATE, ACTION TO RECOVER, 5, 6; WILL, 8.

CONSIDERATION.

See CITY, 5; DEED, 4, 5; DESCENTS; FRAUDULENT CONVEYANCE, 1; INJUNCTION, 1; PROMISSORY NOTE, 10, 12, 14.

CONSTITUTIONAL LAW.

See TOWN, 3 to 5; WITNESS, 2.

CONTRACT.

See CITY, 5, 15; CORONER, 2; FRAUDULENT CONVEYANCE, 1; INJUNCTION, 1, 2; INSANITY, 1; JUDGMENT, 10; LANDLORD AND TENANT; MARRIED WOMAN, 3 to 9, 12, 13; NEGLIGENCE, 2 to 4; PARTNERSHIP; PROMISSORY NOTE, 5, 10, 18 to 20; SET-OFF, 2, 4; TRIAL; VENDOR AND VENDEE; WILL, 6.

CONVERSATION.

See EVIDENCE, 2, 3; WILL, 4.

CONVEYANCE.

See DEED; DESCENTS; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 3 to 9, 12, 13; VENDOR AND VENDEE, 8, 9; WILL, 8.

COPY.

See JUDGMENT, 1; REAL ESTATE, ACTION TO RECOVER, 5.

CORONER.

1. *Authority to Employ Chemist.*—The authority of a coroner to employ a chemist to discover whether poison caused the death of one on whose body he holds an inquest does not restrict him to the employment of a resident of the county. *Board, etc., v. Jameson, 154*
2. *Same.—Contract.*—That a coroner was, by corrupt appliances of others, induced to employ a chemist, is no defence to a suit by the chemist to recover compensation for his services. *Ib.*

CORPORATION.

See CITY, 15; CRIMINAL LAW, 3; HABEAS CORPUS; MANDATE, 1; SCHOOL LAW; TOWN.

COUNTER-CLAIM.

See VENDOR AND VENDEE, 5.

COUNTY AUDITOR.

See COUNTY SUPERINTENDENT, 2; INJUNCTION, 4.

Delinquent Taxes.—Fees and Salaries.—Statute Construed.—A county auditor can not recover from the county for services rendered since the act of March 31st, 1879 (Acts 1879, p. 130), took effect, in apportioning among the various funds allowances made to former county treasurers for

collecting delinquent taxes. The salary allowed in such act must compensate for such services. *Nowles v. Board, etc., 179*

COUNTY COMMISSIONERS.

See MECHANIC'S LIEN, 1; RAILROAD.

COUNTY SUPERINTENDENT.

1. *Appointment.—Eligibility.—Office and Officer.—Alien.—Inhabitant.—Citizen.*—An inhabitant of a county during one year preceding his appointment to the office of county superintendent is not ineligible thereto because not a citizen thereof during so long a time. A citizen is a native or naturalized person. An inhabitant is one having a fixed and permanent residence in a county. *State, ex rel., v. Kilroy, 118*
2. *Same.—Common Schools.—Township Trustees.—County Auditor.—Statute Construed.*—In the appointment of a county superintendent of common schools, under section 4424, R. S. 1881, the county auditor, although clerk of such election and authorized to give the casting vote in case of a tie, has no power to dictate the manner of voting, or to declare the result of a vote of the trustees. *Ib.*
3. *Same.*—In making such appointment the means and mode of arriving at a result are to be determined by the trustees, without dictation from others. *Ib.*

COUNTY TREASURER.

See INJUNCTION, 4.

COURTS.

See AGREED CASE, 2; CRIMINAL LAW, 1, 2; JUDGE; JUDGMENT, 8; JUSTICE OF THE PEACE; MECHANIC'S LIEN, 1; PRACTICE, 1 to 3, 6, 7.

COVERTURE.

See MARRIED WOMAN; PARTITION, 5.

CRIMINAL LAW.

1. *Plea of Guilty.—Withdrawal of Plea.—Discretion of Court.*—Where it appears that the defendant, on arraignment upon an indictment charging him with a felony, voluntarily enters as his plea to such indictment, that he is guilty as therein charged, his subsequent application to the court for leave to withdraw such plea of guilty is addressed to the sound discretion of the court below; and, unless there appears an abuse of such discretion, the Supreme Court will not interfere with its exercise. *Conover v. State, 99*
2. *Same.—Motion for Leave to Withdraw Plea.—Oral and Written Evidence.*—Upon the hearing of the motion for leave to withdraw a former plea, it is competent for the court to hear such evidence, oral or written, as either party may offer; and if affidavits are offered by either party, the opposite party may, with permission of the court, orally cross-examine the affiants, if they can be produced at the hearing. *Ib.*
3. *Nuisance.—Railroad.—Town.—Obstructing Street.*—Indictment against a railroad company for a nuisance by obstructing the streets and public square of a town by its tracks, switches and buildings, and by the manner of their use. A special plea, that the defendant had lawfully acquired the right to use the *locus in quo* for the purposes of a railroad, and that in the use of its tracks, switches and buildings, it creates only such temporary obstructions as result from the reasonable and necessary transaction of its railroad business, is good on demurrer. *State v. Louisville, etc., R. R. Co., 114*
4. *Obtaining Money Under False Pretences.—Indictment.—Benevolent Society.*—An indictment, charging that the defendant, on, etc., at, etc., by falsely pretending to be a member of a certain Masonic lodge in Ohio, that

he was on his way to his father-in-law's funeral, and was out of money to travel, and by exhibiting a forged receipt from the Ohio lodge for dues, obtained from M. lodge of Masons a sum of money named, upon a promise to repay the same, with intent to defraud M. lodge, knowing said pretences to be false and the receipt to be forged, is good on motion to quash. *Strong v. State, 208*

5. *Same.—Evidence.*—Evidence, in such case, that the defendant had, by pretences somewhat similar, at another time and a distant place, defrauded another Masonic lodge, is not admissible. *Ib.*
6. *Public Indecency.—Pleading.*—In a prosecution under section 1995, R. S. 1881, for using obscene language in the presence of women, an affidavit or indictment which fails to state the language alleged to have been used by the defendant, or an excuse for not stating it, is insufficient. *State v. Burrell, 318*
7. *Grand Jury.—Legality of.—Act of 1881.*—A grand jury empanelled and in existence at the taking effect of the act of April 15th, 1881, Acts. 1881, p. 557 (R. S. 1881, sec. 1385 *et seq.*), was not discontinued by force of that act. *Williams v. State, ex rel., 400*
8. *Same.—Action Upon Recognizance Bond.*—Prior to the act of April 15th, 1881, an action upon a recognizance could not be brought before the close of the term at which the forfeiture was declared; but the appointment of an adjourned term to be held after the ensuing regular term in another county of the same circuit did not prevent the bringing of such action. *Ib.*
9. *Same.—Statute Construed.—Empanelling Grand Jury.*—The act of April 15th, 1881, does not repeal section 12 of the prior law concerning the selection and empanelling of grand juries. *Ib.*
10. *Change of Venue.—Practice.—Murder.*—In the absence of a rule of court upon the subject, an application for a change of venue from the county may be made at any time before the jury is sworn to try the issue, and if the application is in proper form, founded on excitement or prejudice in the county, the statute, R. S. 1881, section 1771, requires, in capital cases, that the venue be changed. *Hunnel v. State, 431*
11. *Same.—Trial.—Jury.*—A trial by jury can not begin until the jury is sworn, and in a criminal cause does not include the arraignment or any other merely preparatory proceeding taken prior to swearing the jury to try the cause. *Ib.*

CROPS.

See HUSBAND AND WIFE, 2.

DAMAGES.

See CITY, 8, 10, 12; HIGHWAY, 6; INJUNCTION, 3; MALICIOUS PROSECUTION; PROMISSORY NOTE, 7; REPLEVIN, 1; SEDUCTION, 1; SHERIFF, 2; SUPREME COURT, 16; VERDICT.

DECEDENTS' ESTATES.

See EVIDENCE, 4; EXECUTION, 1; PARTITION, 1 to 3; PRINCIPAL AND SURETY; PROMISSORY NOTE, 19; SET-OFF, 5.

1. *Promissory Note.—Assignor and Assignee.—Powers of Administrator.*—At common law, an executor or administrator had the same property in, and the same powers over, the personal estate and effects of his decedent, that such decedent had at and before his death; and where an administrator barter and assigns promissory notes belonging to his decedent's estate, the assignee thereof would, under the common law, take a good and valid title to such notes as against any subsequent administrator, heir at law or creditor of the decedent.

Rogers v. Zook, 237

2. *Same.—Endorsement or Assignment.—Devastavit.*—In this State an executor or administrator may endorse or assign promissory notes, due or payable to his decedent, so as to vest the title thereto in the assignee; but where the executor or administrator barter and assigns promissory notes belonging to his decedent's estate for his own private purposes, to an assignee with notice, such transfer is simply a *devastavit* of such estate; and, in such case, any one who, with notice, participates in the *devastavit*, will be liable for its full amount to any creditor, subsequent administrator or heir at law of the decedent. *Ib.*
3. *Estates Less than \$500.—Widow Takes Free from Judgment Lien.*—A widow to whom her husband's whole estate, consisting in part of lands, is awarded, under the statute (R. S. 1881, sections 2419–2422), takes the lands free from the lien of judgments rendered against her husband in his lifetime. *Quakenbush v. Taylor, 270*
4. *Administrator's Petition to Sell Real Estate to Pay Debts.—Appeal.*—An administrator might, under the act concerning decedents' estates in force in 1876, appeal within one year from a judgment against him on a petition to sell real estate to pay debts. *Hunter v. French, 320*
5. *Same.—Answer.—Fraudulent Claim.*—To an administrator's petition to sell lands to pay debts, an answer is good on demurrer, which avers that the personal estate was sufficient to pay all just debts; that the administrator seeks to sell the lands to pay an unjust claim, the allowance of which was procured by the fraud of an heir who had brought suit for partition which resulted in a sale of the lands to the defendant at a full price. *Ib.*
6. *Executor de son Tort.—Appointment of Administrator.—Answer in Abatement.—Demurrer.*—In a suit by the administrator of a decedent's estate against an executor *de son tort* of the same estate, an answer in abatement, to the effect that the administrator had been appointed by the clerk, and his appointment had not been confirmed by the court at the commencement of the suit, is bad on demurrer. *Collier v. Jones, 342*
7. *Same.—General Denial.—Argumentative Denial.—Demurrer.—Harmless Error.*—In such a suit, where the general denial is pleaded, the error of the court, if it be such, in sustaining a demurrer to a paragraph of answer which is merely an argumentative denial of the complaint, is harmless, and is not available for the reversal of the judgment. *Ib.*
8. *Same.—Payment.*—In such a suit, a plea of payment is not a proper answer and sustaining a demurrer thereto, if erroneous, is harmless. *Ib.*

DECLARATIONS.

See EVIDENCE, 1 to 3.

DEDICATION.

See HIGHWAY, 3.

DEED.

See DESCENTS; FRAUDULENT CONVEYANCE, 1; MARRIED WOMAN, 3 to 9, 12, 13; REAL ESTATE, ACTION TO RECOVER, 1, 5; VENDOR AND VENDEE, 8, 9; WILL, 8.

1. *Tax Deed.—Description.—Mistake.—Reformation.*—A deed to a purchaser for taxes which, by mistake of the county auditor, erroneously describes the land, can not be reformed by suit. *Keepfer v. Force, 81*
2. *Same.—County.*—Where section, township and range are given by numbers, in a deed of lands, it is not necessary that the county where the lands are situated should also be given. *Ib.*
3. *Description.—Real Estate.—“Part of” Not Words of Certainty.*—A description: “The southeast part of the southeast fourth of the northeast

quarter of section 36, township 4 south, and range 2 east, containing thirty-two acres," is insufficient, being indefinite and uncertain.

Shoemaker v. McMonigle, 421

4. *Conveyance.—Consideration.—Defeasance.—Condition Subsequent.*—When a conveyance is made upon no consideration except certain *terms* specified in a separate writing made by the grantee to the grantor, the terms stated must be regarded as expressive of conditions subsequent, for a breach of which a forfeiture of the estate may be had.

Wilson v. Wilson, 472

5. *Same.—Record.—Notice.—Volunteer.*—An unrecorded defeasance, notwithstanding section 2932, R. S. 1881, is good as against a volunteer who receives a conveyance of the land without notice of the defeasance. A volunteer stands in the shoes of his grantor.

Ib.

DEFAULT.

See REVIEW OF JUDGMENT, 1, 2.

DEFEASANCE.

See DEED, 4, 5; REAL ESTATE, ACTION TO RECOVER, 5.

DEFECTS CURED.

See HABEAS CORPUS. 9

DELIVERY BOND.

See JUSTICE OF THE PEACE, 4.

DEMAND.

See VENDOR AND VENDEE, 9; WILL, 8.

DEMURRER.

See CITY, 4; DECEDENTS' ESTATES, 6 to 8; HARMLESS ERROR; PRACTICE, 10; PROMISSORY NOTE, 14; STATUTE OF LIMITATIONS; SUPREME COURT, 7; TAXES.

1. *Form of.*—A demurrer to an answer, assigning for cause that "neither of said paragraphs constitutes any defence to this action," is insufficient under the code, and should be overruled. *Reed v. Higgins*, 145
2. *Same.—Effect of.*—A demurrer to a reply searches so much of the answer as the reply is addressed to, and, if the latter be bad, the demurrer should be sustained to it. *Ib.*
3. *Uncertainty.—Practice.*—Uncertainty, as a rule, is not a cause for demurrer, but where the pleading is so vague as not to state a cause of action or ground of defence, a demurrer will lie. *Connersville v. Connersville, etc., Co.*, 235
4. *Same.—Joint Demurrer.*—A demurrer addressed to several paragraphs jointly of a pleading must be overruled, if any one of the paragraphs is sufficient. *Ib.*
5. *Argumentativeness.*—Argumentativeness in a pleading is not cause of demurrer under the code. *State, ex rel., v. Wylie*, 396

DESCENTS.

See INSURANCE; PARTITION, 5; WILL, 7.

Husband and Wife.—Conveyance.—Consideration.—Reversion.—Statute Construed.—Where a husband, in consideration of love and affection, causes his lands to be conveyed to his wife, the whole of such lands, upon her death intestate, seized of the lands and without children, or their descendants, leaving the husband surviving, reverts to him, under section 2473, R. S. 1881, between which and section 2489 there is no conflict. *Fontaine v. Houston*, 205

DESCRIPTION.

See DEED, 1 to 3; SHERIFF'S SALE, 2 to 4.

DILIGENCE.

See CITY, 11; PRACTICE, 11; PROMISSORY NOTE, 5; REVIEW OF JUDGMENT, 4.

DISAFFIRMANCE.

See MARRIED WOMAN, 4, to 9, 12, 13.

DISCLAIMER.

See REAL ESTATE, ACTION TO RECOVER, 4.

DISCRETION.

See CRIMINAL LAW, 1, 2; JUDGE, 4.

DISMISSAL.

See ASSIGNMENT OF ERROR; ATTACHMENT, 3; HIGHWAY, 5; JUSTICE OF THE PEACE, 3; MECHANIC'S LIEN, 1; SUPREME COURT, 2.

EASEMENT.

See NEGLIGENCE, 6.

EJECTMENT.

See JUSTICE OF THE PEACE, 1, 2; MARRIED WOMAN, 7, 8; REAL ESTATE, ACTION TO RECOVER; STATUTE OF LIMITATIONS.

ELECTION.

See WILL, 2, 3.

ELECTIONS.

See COUNTY SUPERINTENDENT, 2, 3; TOWN, 5, 6.

EMPLOYER AND EMPLOYEE.

See CITY, 7.

ENDORSER AND ENDORSEE.

See PROMISSORY NOTE, 4, to 7, 13 to 15, 17.

EQUITY.

See ATTORNEY, 1; BANKRUPTCY; INJUNCTION; JUDGMENT, 9; PARTIES; PROMISSORY NOTE, 10, 15; SET-OFF, 6; TRIAL; VENDOR AND VENDEE, 3, 4.

Law.—Where equities are equal, the law prevails. *Taylor v. Morgan*, 295

ESTOPPEL.

See AGREED CASE, 1; MARRIED WOMAN, 9, 12; MALPRACTICE, 2, 3; PARTNERSHIP.

EVIDENCE.

See BILL OF EXCEPTIONS, 5 to 7; CITY, 2; CRIMINAL LAW, 2, 5; EXECUTION, 3, 5; HIGHWAY, 3; HUSBAND AND WIFE, 1; JUDGE, 5; JUDGMENT, 3, 4, 10; MARRIED WOMAN, 10; NEW TRIAL; PARTITION, 1 to 3; PARTNERSHIP; PRACTICE, 1 to 3, 11; PROMISSORY NOTE, 5, 6, 12, 16; REPLEVIN, 1; SEDUCTION, 1; SHERIFF, 1, 3; SHERIFF'S SALE, 5; SUPREME COURT, 8, 11, 12, 15, 18, 19, 22, 23, 25, 26; VENDOR AND VENDEE, 4; WILL, 4, 5; WITNESS.

1. *Assault and Battery.*—*Res Gestæ.*—*Declarations.*—*Admissions.*—The declarations of a plaintiff while lying on the floor where he had been thrown by the defendants, who were present and still pursuing their attack upon him, constitute part of the *res gestæ*, and, in a suit for the assault and battery, are admissible for the plaintiff. It was also competent

as evidence of an admission by the defendants of the facts declared, if they remained silent. *Puett v. Beard, 104*

2. *Same.—Conversation.*—When part of a conversation between parties is properly in evidence, the whole, together with the attending circumstances, including the remarks of others then made, are admissible, to enable the jury to interpret any admissions made on the occasion. *Ib.*
3. *Same.*—During a trial before a justice of the peace, one who was testifying as a witness left the stand to engage, with others, in violence against J. B. This breach of the peace put an end to the trial. The witness then resumed his place and said to an attorney: "We are ready to go on with the trial." To which the attorney answered: "You and your crowd have nearly killed J. B., and we can not go on with the trial. You have disabled him so that we can't try the case now." To which no response was made.
- Held*, that this was proper evidence in a suit for the injury by J. B. against his assailants. *Ib.*
4. *Claim.—Decedents' Estates.*—In an action against an estate for services rendered in boarding, caring for and waiting upon the decedent, by a cripple who moved about upon his hands and knees, it is not error to prove that he had been seen splitting rails, for the purpose of showing his ability to render the services in dispute. *Hall v. Stanley, 219*

EXCEPTION.

See AGREED CASE; BILL OF EXCEPTIONS; SHERIFF, 1.

EXCESSIVE DAMAGES.

See CITY, 10.

EXECUTOR.

See DECEDENTS' ESTATES, 2, 5; PROMISSORY NOTE, 19.

EXECUTION.

See JUDGMENT, 10; PROMISSORY NOTE, 10; SET-OFF, 1; SHERIFF; SHERIFF'S SALE; VENDOR AND VENDEE, 4, 5, 6.

1. *Proceedings Supplementary.—Complaint.—Decedents' Estates.—Claim.—Judgment.—Assignor and Assignee.*—In a proceeding, under section 522 of the code of 1852, by the heirs of a deceased judgment creditor, to subject a claim alleged to have been assigned to the judgment debtor, to the payment of the judgment, the complaint, as against the assignor, need not aver that the judgment debtor had unjustly refused to apply the claim to the payment of the judgment, or had claimed any part of his property as exempt from execution. *Fowler v. Hobbs, 131*
2. *Same.—Assignment.—Admission.—Answer Filed in Another Action not Conclusive.*—An answer by the assignor filed in another action, alleging that he had sold and assigned in writing the claim to the judgment defendant in consideration of his promise to convey him a certain parcel of land, does not conclude him, but he may show that the assignment was never delivered. It is at most a mere admission that may be contradicted. *Ib.*
3. *Same.—Evidence.*—Where, in such action, the evidence shows conclusively that such assignment was never delivered, it is error to order the money arising from such claim to be applied in payment of such judgment. *Ib.*
4. *Householder.—Proceeding Supplementary to Execution.—Pleading.—Exemption.*—In a proceeding supplementary to execution, the execution plaintiff must affirmatively show that the property sought to be reached is subject to execution, and the execution defendant, being a householder, has a right to plead his exemption in bar. *Lowry v. McAlister, 543*

5. *Same.—Evidence.*—In such case, evidence that the execution defendant was a widower, living with his three children at the house of his father-in-law, that he paid their board and supplied them with clothing and other necessities, fully established the claim that he was a householder. *Ib.*

EXECUTORY CONTRACT.

See VENDOR AND VENDEE, 8, 9.

EXEMPTION.

See EXECUTION, 4, 5; SET-OFF, 1.

EXHIBIT.

See JUDGMENT, 1; REAL ESTATE, ACTION TO RECOVER, 5.

EXPERT.

See WILL, 5.

FALSE REPRESENTATIONS.

See PROMISSORY NOTE, 9.

FALSE PRETENSES.

See CRIMINAL LAW, 4, 5.

FEES AND SALARIES.

See COUNTY AUDITOR; TOWNSHIP TRUSTEE.

FINDING.

See PARTITION, 3; REAL ESTATE, ACTION TO RECOVER, 1; SHERIFF, 1; SPECIAL FINDING; SUPREME COURT, 22, 25; VENIRE DE NOVO; VERDICT.

FORECLOSURE.

See MORTGAGE, 1, 2; PROMISSORY NOTE, 5; REVIEW OF JUDGMENT, 2.

FOREIGN CORPORATION.

See HABEAS CORPUS.

FOREIGN STATUTE.

See HABEAS CORPUS; PRESUMPTION.

FORFEITURE.

See DEED, 4; WILL, 8.

FORMER ADJUDICATION.

See MALPRACTICE, 2, 3; SUPREME COURT, 6.

FRAUD.

See DECEDENTS' ESTATES, 5; FRAUDULENT CONVEYANCE; PROMISSORY NOTE, 9; TRIAL.

FRAUDULENT CONVEYANCE.

See TRIAL.

1. *Husband and Wife.—Contract.—Consideration.—Partnership.*—A husband and wife and a third person did business as partners, agreeing to share profits equally; money of the wife was used in the business; large profits were made, but the husband having overdrawn his share, his debt to the firm was, by agreement of all the partners, charged to his wife's account, and in consideration of this adjustment he executed to her an agreement to convey to her, or to their daughter, certain real estate, and afterwards, being insolvent and indebted to plaintiff, conveyed to the daughter.

Held, that the agreement to convey rested upon a valuable executed con-

sideration, and the conveyance made was valid as against the creditors of the grantor. *Huffman v. Copeland*, 224

2. *Complaint to Set Aside Fraudulent Liens.—Insolvency.*—In a complaint by a creditor to set aside fraudulent liens upon the debtor's property, the insolvency of the debtor is well shown by averments to the effect that at and from the date of the liens to the commencement of the action, the debtor had no property subject to execution except that upon which the liens had been placed. *Nugen v. First Nat'l Bank*, 311

GOOD-WILL.

See INJUNCTION, 1, 2.

GRAND JURY.

See CRIMINAL LAW, 7, 9.

GUARANTOR.

See CHAMPERTY.

GUARDIAN AND WARD.

See INSANITY, 3; MARRIED WOMAN, 10; SET-OFF, 5.

HABEAS CORPUS.

Pleading.—Foreign Statute.—"Children's Home."—*Custody of Child.*—*Complaint not Cured by Reply.*—In an action by a foreign corporation to enforce a statutory right to the custody of a child, the complaint must set forth according to its tenor so much of the foreign statute as is relied on; and defects of the complaint in this respect can not be cured by the reply. *Milligan v. State, ex rel.*, 553

HARMLESS ERROR.

See CITY, 12; DECEDENTS' ESTATES, 7; PROMISSORY NOTE, 6; SUPREME COURT, 13.

Demurrer.—It is a harmless error to sustain a demurrer to a paragraph of answer which pleads a defence admissible under another paragraph not demurred to, or where the defence so pleaded is allowed to be proved on the trial. *Board, etc., v. Jameson*, 154

HEIRS.

See DECEDENTS' ESTATES, 2, 5; DESCENTS; EXECUTION, 1; INSURANCE; PARTITION, 5; STATUTE OF LIMITATIONS; WILL, 7.

HIGHWAY.

1. *Location.—Appeal.—Statute Construed.*—An appeal to the circuit court from an order of a board of commissioners establishing a highway presents in the latter court for decision only such questions and issues as have been made before the board or by proper amendment on appeal. Section 5777, R. S. 1881, can not be applied, in its literal construction, to such an appeal. *Green v. Elliott*, 53
2. *Same.—Public Utility.*—Whether a proposed highway will be of public utility depends not upon an absolute necessity for it, but whether the public convenience requires it. *Ib.*
3. *Same.—Dedication.—Evidence of Public Acceptance.*—A highway may become public by dedication by the owner of the land, and an acceptance thereof by the public; and public use of it, without any public work having been done upon it, may evince such acceptance. *Ib.*
4. *Judgment.—Practice.—Supreme Court.*—Petition to a county board for a highway thirty-three feet wide. The board appointed viewers, with directions to locate and mark it thirty feet wide, and they reported accordingly. There was then a remonstrance for want of public utility and for damages, and viewers having reported against the remonstrants, the board, by order, established the highway thirty-three feet

wide. An appeal to the circuit court resulted in a similar judgment, and there was no application to that court to change or modify its judgment. That judgment and the final order of the board are questioned in the Supreme Court.

Held, that the latter, having been vacated by the judgment, could not be now questioned.

Held, also, that the judgment could not be objected to for the first time in the Supreme Court. *Powers v. Johnson*, 298

5. *Viewers.—Dismissal.—Practice.*—Objections to the reports of viewers furnish no ground for the dismissal of proceedings to establish a highway. *Brown v. Stewart*, 377

6. *Same.—Remonstrance.—Public Utility.—Damages.*—Where the remonstrance against establishing a highway questions the utility of the proposed way, and also claims damages, the viewers must report upon both matters. *Ib.*

HOUSEHOLDER.

See EXECUTION, 4, 5.

HUSBAND AND WIFE.

See DESCENTS; FRAUDULENT CONVEYANCE, 1; INSURANCE; MARRIED WOMAN; PARTITION, 1 to 3; SHERIFF'S SALE, 6; VENDOR AND VENDEE, 2, 5; WITNESS, 3.

1. *Agency.—Witness.—Evidence.—Confidential Communications.*—The conversations between husband and wife, whereby she constitutes him her agent to transact her business, are not confidential communications within the meaning of section 497, R. S. 1881, and either is a competent witness to prove them. *Schmied v. Frank*, 250

2. *Wife's Land.—Presumption.—Crops.—Tenant.*—Where a husband aids the family in the cultivation of his wife's lands, the presumption, in the absence of other proof, is, under the statute, R. S. 1881, section 5116, that the crops produced are hers, and not his as tenant. *Scott v. Hudson*, 286

IMPROVEMENTS.

See REAL ESTATE, ACTION TO RECOVER, 6; VENDOR AND VENDEE, 1.

INFANT.

See MARRIED WOMAN, 3 to 13; NEGLIGENCE, 2 to 4.

INHABITANT.

See COUNTY SUPERINTENDENT, 1.

INJUNCTION.

1. *Agreement not to Engage in Business.—Good-Will.—Restraint of Trade.—Inadequacy of Consideration.—Equity.*—An agreement not to engage in a particular business at a particular place will be enforced at law without enquiring into the adequacy of the consideration; not so on an application for an injunction, as a court of equity may decline to interfere when the disproportion between the consideration and the restriction is such as to make the agreement hard and oppressive. *Thayer v. Younge*, 259

2. *Same.—Complaint.—Physician.*—A complaint by one physician against another to enforce by injunction an agreement of the latter to keep out of the practice, which does not show the amount of practice done by each, nor that the business of the plaintiff had been made less remunerative by reason of the breach of the agreement, is not good. *Ib.*

3. *Trespass.—Damages.*—An injunction to restrain a threatened trespass, which can be compensated in damages, will not be granted. *Anthony v. Sturgis*, 479

4. *Illegal Tax.—Tax Duplicate.—County Treasurer.—Complaint.*—A complaint, averring that a county treasurer has demanded and endeavored to collect from the plaintiff a certain illegal tax placed by the auditor unlawfully upon the tax duplicate of the county, but not averring that such duplicate had ever come to the hands of the treasurer, furnishes no ground for injunction against either the auditor or treasurer. *Ib.*
5. *Receiver.—Notice.—Presumption.—Supreme Court.*—When the record is silent as to notice of an application in vacation for a temporary injunction and the appointment of a receiver, the Supreme Court, on appeal from an order granting them, will presume that notice was given. *Miller v. Shriner, 493*
6. *Same.—Affidavits.—Bill of Exceptions.*—Affidavits in support of motions in vacation for a temporary injunction and a receiver are no part of the record unless made so by bill of exceptions. *Ib.*
7. *Same.—Proceedings to Obtain Injunction.—Complaint.*—A temporary injunction can not be granted, save in the case provided for in sec. 137 of the code of 1852 (R. S. 1881, sec. 1148), where the complaint shows no case for it. *Ib.*
8. *Delinquent Tax Sale.—Ownership of Personal Property.—Pleading.—Motion to Make Specific.*—Complaint by a purchaser of real estate at sheriff's sale, to enjoin its sale for delinquent taxes, alleging that the delinquent owner had "leviable personal property," etc.
Held, that a motion to make specific by a particular description of such personalty, and where situated, should have been granted. *Volger v. Sidener, 545*

INSANITY.

See WILL, 5.

1. *Contract.*—The contracts of a person duly adjudged insane are void. *Redden v. Baker, 191*
2. *Same.—Continued and Conclusive Effect of Adjudication.—Notice.*—The disability of insanity, once established by an adjudication under the statute, continues and is conclusive until the restoration of reason has been determined in the manner prescribed by the statute, and the world must take notice of it. *Ib.*
3. *Same.—Appointment of Guardian.*—The adjudication has no less force before than after the appointment of a guardian, and is not affected by a discharge of the guardian upon a final settlement of his accounts. *Ib.*
4. *Same.—Marriage and Change of Name.*—The marriage and consequent change of name of a female insane ward does not affect the force of the adjudication of insanity. *Ib.*
5. *Same.—Testamentary Capacity.—Quære:* Whether or not an adjudication of insanity under the statute is conclusive evidence of testamentary incapacity? *Ib.*

INSOLVENCY.

See FRAUDULENT CONVEYANCE, 2; PROMISSORY NOTE, 4, 6; VENDOR AND VENDEE, 8.

INSTRUCTIONS TO JURY.

See CITY, 12; JUDGE, 5; JUDGMENT, 10; NEGLIGENCE, 3; PRACTICE, 2, 3; SUPREME COURT, 3, 9, 13, 17, 20, 26.

1. *Practice.*—There is no error in refusing to give a correct instruction which is fairly embraced in instructions which have been given. *Evansville v. Willer, 414*
2. When the court has fully instructed the jury concerning every question in the case, there is no error in refusing further instructions upon particular points. *Starret v. Burkhalter, 439*

INSURANCE.

Life Insurance.—Husband and Wife.—Assignor and Assignee.—Collateral Security.—Descent.—S. took a policy on his life, payable to himself and his assigns, for the benefit of his wife, and paid the premiums until the death of the wife, her husband and two children surviving. S. assigned his interest in the policy to H. by endorsement, as security for a debt, and thereafter for several years H. paid the annual premiums, until S. died.

Held, that on the death of the wife one-third of the policy went to the husband, and two-thirds to the children, subject to the right of her administrator to collect the whole.

Held, also, that the assignment of the husband carried to the assignee only the husband's rights as an heir of his wife.

Held, also, that the assignee was entitled to be refunded out of the proceeds of the policy the amount of premiums paid by him, with interest.

Harley v. Heist, 196

INTEREST.

See PROMISSORY NOTE, 7, 18; TOWN, 2.

State Bonds.—Internal Improvement Loan.—Compound Interest.—Unreasonable Delay of Payment.—Question of Fact or Law.—Where it appears that there is a controversy between the State and the holder of its bonds, in regard to the rate of interest, such bonds shall bear after maturity, and that the State, under the advice of its Attorney General, has delayed payment until the question in dispute could be determined by the courts, the question as to whether or not the delay of payment for such a purpose was so unreasonable as to entitle the holder of the bonds to compound interest, is a question of fact and not of law.

State, ex rel., v. Porter, 404

INTERNAL IMPROVEMENT LOAN.

See INTEREST.

INTERROGATORIES.

See PRACTICE, 12; SUPREME COURT, 26.

ISSUE.

See SUPREME COURT, 26; TRIAL.

JUDGE.

See MANDATE, 2, 3; PRACTICE, 7.

1. *Judge Pro Tem.—Repeal of Statute.*—The 4th section of the act of March 1st, 1855, 2 R. S. 1876, p. 10, relative to the appointment of special judges, was not repealed by section 1383, R. S. 1881, on the same subject.
State, ex rel., v. Murdock, 124
2. *Same.—Appointment.—Jurisdiction.—Collateral Attack.—Presumption.*—The appointment of a judge *pro tem.* at one term of court, to act at the next term, though irregular, gives such color of right to act at the next term as to make a judge *de facto*, whose authority can not be questioned collaterally by one who at the time made no objection; and in such case it will be presumed, the contrary not appearing, that there were sufficient reasons for the appointment when made.
Ib.
3. *Jurisdiction.—Change of Venue.—Practice.*—Where, upon a change of venue for bias of the judge, another judge is appointed to try the cause who does so without objection, it is too late afterwards to make a question as to his jurisdiction.
Huffman v. Cauble, 591
4. *Same.—Trial.—Discretion of Judge.—Right to Question Witnesses.*—A judge presiding during the trial of a cause is more than a mere moderator between contending parties; he is charged with the grave duty of maintaining truth and preventing wrong, and, to this end, has a large dis-

cretion, which, if exercised without abuse, will not be error. He may propound proper questions to witnesses, with a view to elicit the facts; and if they be leading questions it is not available error. *Ib.*

5. *Same.—Instructions.—Stating Evidence.*—In instructing the jury the judge may state the evidence, if he tell the jury that they are to determine what it proves; but he must not tell them that certain facts in issue are proved, or assume them to be true. *Ib.*

JUDGMENT.

See AGREED CASE; ATTACHMENT, 2, 3; ATTORNEY, 1, 2; BANKRUPTCY; CITY, 11; DECEDENTS' ESTATES, 3; EXECUTION, 1 to 3; HIGHWAY, 4; INSANITY, 2 to 5; JUSTICE OF THE PEACE, 2, 4; MALPRACTICE, 2, 3; MARRIED WOMAN, 2; MORTGAGE, 2; PARTIES; PARTITION, 4, 5; PAYMENT; PROMISSORY NOTE, 10; REAL ESTATE, ACTION TO RECOVER, 2, 4; REVIEW OF JUDGMENT; SET-OFF, 1 to 4; SUPREME COURT, 1, 6, 8, 11, 12, 23, 24; VENDOR AND VENDEE, 1, 6.

1. *Action on.—Complaint.—Exhibit.*—A copy of the judgment sued on is not a proper part of a complaint on such judgment. *Hopper v. Lucas, 43*
2. *Same.—Justice of the Peace.*—A complaint upon the judgment of a justice of the peace must allege that it was duly given or made, or contain equivalent allegations. *Ib.*
3. *Same.—Transcript.—Evidence.*—On the trial of an action upon a judgment of a justice of the peace, a transcript thereof concluding: "It is therefore adjudged by me that the plaintiff recover of the defendants Miller and Cox the sum of 133.95, with costs taxed at 1.00. Given under my hand," etc., is not inadmissible in evidence because the names of the parties do not fully appear, nor because the cause of action is not copied in full, nor because the amount of the judgment is not written out in words, but is fatally defective in not showing with certainty, in dollars and cents, the amount of the recovery adjudged, and for that reason is not admissible in evidence. *Ib.*
4. *Same.—Original Papers.*—In such case the original papers constituting the cause of action may be given in evidence to explain the meaning of the abstract numerals. *Ib.*
5. *Same.—Confession.—Replevin Bail.*—As between the parties to the suit and the replevin bail, no affidavit is necessary to authorize the entry of a judgment by confession. *Ib.*
6. *Same.—Partner.*—A partner may not confess a judgment against the firm of which he is a member, but a judgment so confessed will be void as to them and valid as to him. *Ib.*
7. *Same.—Replevin Bail.—Waiver.*—By his entry of bail a replevin bail releases errors and waives any right to question the existence of the judgment which he has thereby expressly recognized. *Ib.*
8. *Court of Common Pleas.—Presumption.*—The act abolishing the court of common pleas (1 R. S. 1876, p. 380) expressly continued the existence of terms thereof in session when it took effect, and a judgment thereof, alleged to have been rendered while such term might have been in session, will, in the absence of averment to the contrary, be presumed to have been rendered while the court was in session. *Reed v. Higgins, 143*
9. *Lien of.—Assignor and Assignee.*—A judgment lien attaches to the precise interest which the debtor has in real estate, and no more, except that a good-faith purchaser and assignee of a judgment is protected (in this State) against secret equities inconsistent with the recorded title of the debtor. *Huffman v. Copeland, 224*
10. *Payment.—Evidence.—Presumption.—Agreement.—Stay of Execution.—Settlement.—Burden of Proof.—Instruction.*—In an action for pasturage, evidence that at the date of a judgment against the plaintiff he agreed

to pay the same in pasturage and thereby obtained a stay of execution, and further evidence that the judgment had been satisfied of record, raised a presumption of payment for the pasturage, and justified an instruction that "the plaintiff can not recover unless it appears from a preponderance of the evidence that the claim sued on was omitted intentionally or by mistake from the settlement made when the judgment was settled." *Boswell v. Williams*, 375

JUDICIAL SALE.

See ATTACHMENT, 2; DECEDENTS' ESTATES, 4, 5; MARRIED WOMAN, 1, 2; SHERIFF'S SALE; VENDOR AND VENDEE, 5; WILL, 8.

JURISDICTION.

See JUDGE, 2, 3; JUSTICE OF THE PEACE, 1; MECHANIC'S LIEN, 1; REVIEW OF JUDGMENT, 1.

JURY.

See CITY, 12; CRIMINAL LAW, 7, 9, 11; JUDGE, 5; PRACTICE, 1 to 3; TRIAL.

JUSTICE OF THE PEACE.

See ATTACHMENT, 2; JUDGMENT, 2, 3.

1. *Jurisdiction.—Recovery of Real Estate.*—Justices of the peace have no jurisdiction to hear and determine an action for the recovery of real estate, unless the relation of landlord and tenant exists between the parties, or unless possession has been unlawfully and forcibly taken, or the real estate unlawfully or forcibly detained. *Burgett v. Bothwell*, 149
2. *Same.—Complaint.—Arrest of Judgment.—Practice.*—Where, in an action for the recovery of real estate, commenced before a justice of the peace, the complaint does not aver that the relation of landlord and tenant exists, or that possession of the property was unlawfully and forcibly taken, or was unlawfully and forcibly detained, it is insufficient on a motion in arrest of judgment on appeal in the circuit court. *Ib.*
3. *Practice.—Appeal.—Dismissal.*—A suit commenced before a justice of the peace and appealed to the circuit court may be dismissed because the complaint does not state facts sufficient. *Smith v. Scott*, 346
4. *Same.—Action on Delivery Bond.—Affidavit.—Case Disapproved.*—The intimation in *Harding v. Mansur*, 13 Ind. 454, that, in order to show merits in an appeal from a justice of the peace, the affidavit required by section 90 of the justice's act (sec. 1516, R. S. 1881) must show an effort to use the facts stated as a defence and as ground for a new trial before the justice, disapproved. *Ib.*

LANDLORD AND TENANT.

See HUSBAND AND WIFE, 2; JUSTICE OF THE PEACE, 1, 2; NEGLIGENCE, 2 to 4.

1. *Negligence.—Personal Injury to Tenant.*—Where a stairway, connected with apartments hired in a tenement house occupied by several tenants, is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable for damages to a tenant injured thereby, who uses such stairway with knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use. *Purcell v. English*, 34
2. *Same.—Nudum Pactum.—Repairs.*—A promise to repair made after the lease is entered into is a mere *nudum pactum*, and the landlord is not liable for injuries resulting from a failure to make such repairs. *Ib.*
3. *Tenancy by Sufferance.*—A tenancy by sufferance arises when a tenant, who came into possession lawfully, holds over wrongfully after the determination of his interest. *Coomber v. Hefner*, 108

4. *Same.—Tenancy from Year to Year.*—Under the statute concerning the relation of landlord and tenant, a tenancy for an indefinite time is a tenancy from year to year. *Ib.*
5. *Same.—Holding Over.*—When a tenant for a fixed period holds over the time, with the consent of the landlord, it becomes a tenancy for another like term; unless the parties stipulate for a different term. *Ib.*
6. *Same.—Notice to Quit.*—Notice to quit is necessary in order to terminate either a tenancy at will, or, in the absence of a special contract, a tenancy from year to year. *Ib.*

LAW MERCHANT.

See PROMISSORY NOTE, 2, 3, 11, 13 to 17.

LEGACY.

See WILL.

LIEN.

See ATTORNEY, 1; DECEDENTS' ESTATES, 3; FRAUDULENT CONVEYANCE, 2; JUDGMENT, 9; MECHANIC'S LIEN; PROMISSORY NOTE, 10; VENDOR AND VENDEE; WILL, 1.

LIFE INSURANCE.

See INSURANCE.

MAINTENANCE.

See CHAMPERTY.

MALICIOUS PROSECUTION.

Measure of Damages.—For unsuccessfully prosecuting any civil suit maliciously and without probable cause, an action lies for whatever damages have accrued beyond the taxable costs, the measure of damages in such action being such sum as will recompense the plaintiff for his time, trouble, etc., in defending the suit. *McCardle v. McGinley, 538*

MALPRACTICE.

1. *Parties.—Answer.—Physician.*—To a complaint for malpractice sounding in tort against two surgeons, an answer that each was separately employed is bad. *Goble v. Dillon, 327*
2. *Same.—Estoppel.—Res Adjudicata.*—To a suit against two surgeons for malpractice, a separate answer by one that he had sued the plaintiff before a justice of the peace having jurisdiction, to recover for his services in the same matter, that there was an answer that the services were worthless, and a trial and judgment for the amount of the claim sued for, which remains in force, is good; but if it be alleged that the judgment was without answer, and on default, it is bad; and a reply to such good answer, that the suit for malpractice was pending when that before the justice of the peace was commenced, is bad. *Ib.*
3. *Same.—Judgment for Services.*—In such action, a separate answer by one, that the other had recovered a valid judgment for his services in the matter, does not show a release of the one so pleading, though the judgment be sufficient to estop the suit against the defendant who obtained it. *Ib.*

MANDAMUS.

See MANDATE.

MANDATE.

See CITY, 1; RAILROAD; TOWN, 2.

1. *Adequate Legal Remedy.—Statutory Rule.*—As a general rule, a proceeding by mandate will not be sustained where the plaintiff has an adequate legal remedy; but, under section 1168, R. S. 1881, a writ of mandate

may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust or station. *Gardner v. Haney*, 17

2. *Circuit Judge.—Bill of Exceptions.—Practice.*—Mandate will not be awarded to compel a judge to sign a bill of exceptions, who has not been requested to do so, though his predecessor has wrongfully refused.
State, ex rel., v. Slick, 501
3. *Same.*—Where a judge whose term of office is about to expire refuses to sign a proper bill of exceptions presented in apt time, his successor may be promptly applied to by verified petition showing the facts, and it will be his duty to sign and file the bill, though the time limited for its presentation has expired by reason of the refusal of his predecessor—and then, if he refuse, he may be compelled by mandate to do so. *Ib.*
4. *Practice.*—A remedy by mandate can not be had when the ordinary action affords complete relief. *Indianapolis v. McAvoy*, 587

MARRIAGE.

See INSANITY, 4; PARTITION, 1 to 3.

MARRIED WOMAN.

See FRAUDULENT CONVEYANCE, 1; HUSBAND AND WIFE; PARTITION, 1 to 3; REVIEW OF JUDGMENT, 4; SHERIFF'S SALE, 6; VENDOR AND VENDEE, 2, 5.

1. *Husband and Wife.—Wife's Inchoate Interest Under Act of 1875.—Bankruptcy.—Judicial Sale.*—The act of 1875, whereby a wife's inchoate interest in realty is made absolute upon the transfer of the husband's title by judicial sale, applies to equitable as well as legal estates of the husband; as where the husband, holding a certificate of purchase of school land goes into bankruptcy, and the assignee pays the remainder of the purchase-money and takes a conveyance to himself as assignee.
Keck v. Noble, 1
2. *Same.—Judgment of U. S. District Court.—Appeal.—Statute Construed.*—The assignee in bankruptcy of the plaintiff's husband brought suit in the U. S. District Court, to enjoin her from asserting claim under the act of 1875 to real estate of the bankrupt, and, upon the report of the master, obtained such decree; afterwards, at the same term of court, she obtained a rehearing, upon which the court again overruled her exceptions to the master's report, and ordered that said report stand as the final decree of the court, saving her right of appeal, which appeal she perfected within ten days; during the pendency of this appeal the assignee obtained of said court an *ex parte* order for the sale of said realty, and sold the same to the appellant.
Held, that the appeal was taken in time, and that the order of sale so obtained did not bar her claim; sec. 533 of the code of 1852 (R. S. 1881, sec. 669) not applying to such a case. *Ib.*
3. *Infancy.—Coverture.—Conveyance.—Possession of Real Estate.*—The conveyance by an infant married woman and her husband of her real estate is voidable as to her; but, where such a conveyance was executed prior to 1847, it operates as an absolute transfer of the husband's interest in the land, and entitles the grantee and his heirs to the possession of the land during the joint lives of the grantors. *Sims v. Bardoner*, 87
4. *Same.—Action to Quiet Title.—Disaffirmance.*—Where, at the time of the disaffirmance by the wife of such a conveyance, the grantors were alive, an action to ascertain and quiet her title is the only appropriate remedy of the wife. *Ib.*
5. *Same.—Limitation of Action.*—After disaffirmance such action may be commenced at any time during the continuance of the estate in the grantee or his heirs. *Ib.*

6. *Same.—Double Disability.—Reasonable Time.*—The conveyance of an infant married woman may be disaffirmed by her within a reasonable time after the removal of her double disability. *Ib.*
7. *Same.—Statute of Limitations.*—The right to disaffirm after removal of disability must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed. *Ib.*
8. *Same.—Commencement of Action.*—It is the disaffirmance which avoids the deed of an infant, and not the bringing of the action to recover the land conveyed. *Ib.*
9. *Same.—Case Stated.—Lapse of Thirty-Three Years Not a Bar.*—Where a woman, married in 1844 at sixteen, within a year joined her husband in the conveyance of her land, the consideration being received by him, but in 1881, her husband joining, gave notice of her disaffirmance of the deed, she is not estopped by any statute of limitations from bringing an action to determine and quiet her title to the land so conveyed. In such case the disaffirmance was within a reasonable time. *Ib.*
10. *Minor.—Necessaries.—Wedding Outfit.—Evidence.*—In an action against a man and his wife for the price of goods sold and delivered to her before marriage and during her minority, evidence that she was the owner of land upon which they lived, and that the goods were woman's apparel, and included a wedding outfit, although conflicting with evidence that she was supplied by her guardian and earned wages by service, sustained a conclusion of the court that the goods were in part necessaries suitable to her condition in life, and authorized a finding against the defendants, and a judgment to be levied only of the real estate of the wife. *Garr v. Haskell, 373*
11. *Same.—Question of Law and Fact.*—In such a case, whether the goods are necessaries is a question of law, and, if deemed necessaries, their quantity, quality and reasonable value are matters of fact. *Ib.*
12. *Deed.—Disaffirmance by Infant Grantor.*—A married woman who, prior to 1847, and when an infant, joined her husband in conveying her lands, may, if of age and there be no affirmance of the deed by her, disaffirm the conveyance at any time during her coverture. In such case, her disaffirmance matures her right to quiet her title to the land, though the intermediate estate of the grantee of herself and husband continues during the existence of the marriage relation, the husband being entitled at common law to the possession and income of her estate. *Sims v. Smith, 577*
13. *Same.—Notice.*—The conveyance of the grantee of an infant to a purchaser without notice does not affect the right of the infant to disaffirm her deed. *Ib.*

MASTER AND SERVANT.

See CITY, 7.

MEASURE OF DAMAGES.

See CITY, 12; MALICIOUS PROSECUTION; PROMISSORY NOTE, 7.

MEASURE OF VALUE.

See PROMISSORY NOTE, 5.

MECHANIC'S LIEN.

1. *Enforcement of Lien Against County.—Board of County Commissioners.—Jurisdiction.—Motion to Dismiss.*—A suit to enforce a mechanic's lien, against the public square and court-house of a county, is not such a claim as the board of county commissioners have original jurisdiction of, under the provisions of sections 5758, 5759 and 5760, R. S. 1881;

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but the circuit court of the county has original jurisdiction of such a suit, and a motion to dismiss the suit for want of such jurisdiction is properly overruled. *Board, etc., v. O'Connor, 531*

2. *Same.—Public Square and Court-House.—Acquisition and Enforcement of Lien.—Public Policy.—Public Necessity.*—The mechanic's lien law of this State contains no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use. In the absence of such a provision, public policy and public necessity alike forbid the acquisition or enforcement of such a lien against a public square or court-house of a county. *Ib.*

MISTAKE.

See AGREED CASE, 2; DEED, 1 to 3; JUDGMENT, 10; SHERIFF'S SALE, 2. *Money Paid.—Negligence.*—Money paid under a mistake of fact may be recovered, notwithstanding a negligent failure to use the means of knowledge. *Indianapolis v. McAvoy, 587*

MORTGAGE.

See PROMISSORY NOTE, 5, 10; REVIEW OF JUDGMENT, 2; SHERIFF'S SALE, 2.

1. *Review of Judgment.—Personal Judgment.*—A complaint to review a judgment of foreclosure and *in personam* by default, only alleging as cause for review that the complaint in the original action did not state facts sufficient to constitute a cause of action for a personal judgment, is bad on demurrer. *Shoaf v. Joray, 70*
2. *Indemnity.—Action by Mortgagee to Foreclose.—Payment.—Judgment Against Principal and Surety.*—A mortgage to a surety to indemnify him, which covenants to pay the debt and indemnify the surety, gives a right of action to the surety before payment to foreclose on failure to pay at maturity, if the debt has gone into judgment against the principal and surety, and there be no property of the former, except the mortgaged property, subject to execution. *Bodkin v. Merit, 560*
3. *Same.—Mortgage not Satisfied by Renewal Note.*—A mortgage to secure the payment of a certain note is not satisfied by the giving of other notes in renewal. The debt, and not the mere evidence of it, is the thing secured, and so long as this subsists in any form, the mortgage remains to secure it. *Ib.*

MUNICIPAL CORPORATION.

See CITY; CRIMINAL LAW, 3; MANDATE, 1; MECHANIC'S LIEN; SCHOOL LAW; TOWN.

MURDER.

See CRIMINAL LAW, 10.

NECESSARIES.

See MARRIED WOMAN, 10, 11.

NEGLIGENCE.

See CITY, 8 to 14; LANDLORD AND TENANT, 1, 2; MISTAKE; PRACTICE, 2; PROMISSORY NOTE, 2, 3, 11, 17.

1. *Personal Injury on Account of Defective Turnpike.*—That a traveller had previous knowledge of the dangerous condition of a turnpike will not, alone, prevent him from recovering for injuries incurred in consequence of such dangerous condition. Reasonable care by him to avoid injury does not necessarily mean that he shall forego travel over places known to be dangerous, unless such travel is inconsistent with reasonable prudence. *Henry County T. P. Co. v. Jackson, 111*
2. *Torts.—Infant.—Parent and Child.—Liability of Parent.*—Where a minor son, by contract with his father, cleared a parcel of land, and in doing so negligently set fire to and burned property belonging to a tenant,

- the father was not shielded by his contract from liability for the injuries resulting from his son's negligence. *Teagarden v. McLaughlin*, 476
3. *Same.—Instruction.—Contributory Negligence.—Question of Law or Fact.*—An instruction, in an action for such injuries, which assumes that certain facts constitute contributory negligence, should be refused unless such facts show that the question of negligence is one merely of law. *Ib.*
 4. *Same.—Lessor and Lessee.*—In such case, the fact that the lessee, the plaintiff, had agreed to allow the lessor, the defendant and owner of the land, "one-half the pasturage on said land," did not entitle the lessor to enter for the purpose of burning logs, stumps and brush, thus endangering the tenant's property. *Ib.*
 5. *Railroad.—Liability for Fires.—Pleading.*—A complaint against a railroad company for setting fire to the plaintiff's fences, etc., averring that the defendant carelessly permitted dry grass to accumulate on its right of way, which was set on fire by sparks from its passing locomotive, that the fire escaped to the plaintiff's lands adjoining, and destroyed his fences and grass, and that the fire and injury were not caused by the fault or neglect of the plaintiff, but wholly by the neglect and carelessness of the defendant, sufficiently shows that the escape of the fire from the locomotive, and its communication to the plaintiff's property, were the result of the defendant's negligence. *Pittsburgh, etc., R. W. Co. v. Jones*, 496
 6. *Same.—Right of Way.—Easement.—Adjacent Owner.—Possession.—Contributory Negligence.*—The right of way of a railroad company is only an easement, the fee remaining in the owner of the soil, but the railroad company has the exclusive right of possession, so that the owner of the fee has no right to enter and remove combustibles; that the company permits them to accumulate may warrant a finding of negligence by the company, and it is not contributory negligence for the adjacent owner to permit dry grass and stubble on his lands which will spread fires negligently set by the company. *Ib.*

NEW TRIAL.

See JUSTICE OF THE PEACE, 4; PRACTICE, 8, 11; SUPREME COURT, 19, 21.
Newly-Discovered Evidence.—Bill of Exceptions.—Affidavits.—Affidavits showing newly-discovered evidence in support of a motion for a new trial, are no part of the record unless made so by bill of exceptions. *Washington v. Small*, 462

NOMINAL DAMAGES.

See REPLEVIN, 1; SHERIFF, 2; SUPREME COURT, 16.

NOTARY PUBLIC.

See ATTORNEY, 3.

NOTICE.

See CITY, 9, 11; DEED, 5; INJUNCTION, 5; INSANITY, 2; LANDLORD AND TENANT, 6; MARRIED WOMAN, 13; PRINCIPAL AND SURETY; PROMISSORY NOTE, 1; VENDOR AND VENDEE, 1.

NUDUM PACTUM.

See LANDLORD AND TENANT, 2.

NUISANCE.

See CRIMINAL LAW, 3.

1. *Prescription.*—A right to maintain a nuisance can not be acquired by prescription. *State v. Louisville, etc., R. W. Co.*, 114
2. *Same.—Obstruction of Streets.—City.—Town.*—An unauthorized and ille-

gal obstruction of the public ways of a town or city is a public nuisance. *Ib.*

3. *Same.—Railroad.*—A railroad in the streets of a city is not of itself a nuisance, but an improper and unreasonable exercise of a right to use a street by a railroad company may become a nuisance. *Ib.*

OFFICE AND OFFICERS.

See AGREED CASE; CITY, 1 to 5, 9; COUNTY AUDITOR; COUNTY SUPERINTENDENT; INJUNCTION, 4; MANDATE; MECHANIC'S LIEN, 1; SCHOOL LAW; SHERIFF; TOWN, 2, 5 to 7; TOWNSHIP TRUSTEE.

OPINION.

See WILL, 5.

ORDER.

See CITY, 1 to 5; TAXES.

OWNERSHIP.

See HUSBAND AND WIFE, 2; INJUNCTION, 8; NEGLIGENCE, 6; REPLEVIN, 2; SCHOOL LAW.

PARENT AND CHILD.

See NEGLIGENCE, 2 to 4.

PARTIES.

See MALPRACTICE; RAILROAD; REPLEVIN, 2; SUPREME COURT, 14.

Plaintiff.—Assignor and Assignee.—Agreement.—Where a person receives money of another, and in consideration thereof agrees to assign to the latter any judgment he may obtain on a claim held by him against a third person, it is an equitable assignment of the claim, and the assignee only can sue therefor. *Board, etc., v. Jameson, 154*

PARTITION.

See VENDOR AND VENDEE, 5.

1. *Remarriage of Woman Abandoned by First Husband.—Evidence.—Presumption of Death.—Decedents' Estates.*—In an action of partition by a woman who claimed to be the surviving widow of a decedent, and as such to be entitled to one-third of the land of which he died seized, wherein two of the decedent's children by a former marriage alleged that the plaintiff's marriage was void because she was the wife of another man when she married their father, proof that her first husband had abandoned her more than six years before her marriage to the decedent, which was nearly twenty years before the trial, and that he has never been heard of since, raises a presumption that he was dead, and that he died before the plaintiff's marriage to the decedent. *Cooper v. Cooper, 75*
2. *Same.—Admissions.—Witness.—Widow.*—In such case, if the defendants call a witness who testifies that the plaintiff admitted that her first husband was living after her second marriage, and it does not appear that such admission was made in the decedent's presence, the plaintiff is a competent witness to testify concerning the same matter. *Ib.*
3. *Same.—Finding of Court Against Testimony of Competent Witness.*—The plaintiff is entitled to a trial of the cause upon the theory that she is a competent witness, and where the court before whom said cause is being tried hears her statement, which, if believed, was sufficient to disprove the admissions, but says that if the cause was being tried before a jury he would not permit her to testify, and finds against her, a new trial will be granted, as it is apparent that the cause has been tried upon the theory that she was not competent to testify. *Ib.*

4. *Adjudication of Title.*—Title may be put in issue, tried and settled in partition proceedings; but, ordinarily, such proceedings do not settle title, do not create any new title, but simply divide into separate shares the land held under existing titles. If an adjudication upon the character of the title is desired, issues must be formed directly presenting that question for decision. *Miller v. Noble, 527*
 5. *Same.—Descents.—Widow.—Sheriff's Sale.*—A widow married a second time, having children by her first husband. The real estate which came to her from the first husband was, during her second coverture, sold at sheriff's sale to satisfy a judgment recovered against her, after her second marriage. The purchaser, after obtaining a sheriff's deed, brought an ordinary suit for partition against her and her children by the first marriage; no question of title was sought to be settled by the complaint, nor made by the pleadings, and the decree merely granted partition. Action by said children, after their mother's death, to recover the land so set off to said purchaser.
- Held*, that the purchaser from the sheriff took merely the estate of the judgment debtor, which, under the statute, was an estate in fee simple, determinable upon her death during the second coverture.
- Held*, also, that the partition proceedings did not enlarge this estate.
- Held*, also, that, on the death of the woman, the land went to her children by the first marriage. *Ib.*

PARTNERSHIP.

See FRAUDULENT CONVEYANCE, 1; JUDGMENT, 6.

Estoppel.—Receipt for Money.—Recital of Payment in Contract.—The recital in a written contract of copartnership, that each partner had paid so much money as his share of the capital of the firm, is not conclusive, and will not work an estoppel. Such a recital, like an ordinary receipt or acknowledgment of the payment of money, may be explained, controlled, qualified or even contradicted. *Lowe v. Thompson, 503*

PAYMENT.

See DECEDENTS' ESTATES, 8; JUDGMENT, 10; MORTGAGE, 2; PARTNERSHIP.

1. *Application.*—A debtor owing his creditor several demands has a right, when he makes a payment, or at any time after and before the creditor has applied the payment, to direct upon which of the several demands it shall be applied. *Huffman v. Cauble, 591*
2. *Same.—Promissory Note.—Judgment.*—One having received credit for a payment, in a suit against him on a note, can not receive credit again in another suit upon a different demand, by showing that the judgment recovered in the former suit was for too large a sum. *Ib.*

PERSONAL JUDGMENT.

See MORTGAGE, 1.

PERSONAL PROPERTY.

See DECEDENTS' ESTATES, 1, 2, 5; INJUNCTION, 8; PROMISSORY NOTE, 20; REPLEVIN; TRIAL; WILL, 6.

PHYSICIAN.

See INJUNCTION, 2; MALPRACTICE.

PLEADING.

See ASSIGNMENT OF ERROR; ATTORNEY, 3; CITY, 4, 5, 11, 13; CRIMINAL LAW, 1, 2, 4, 6; DECEDENTS' ESTATES, 5 to 8; DEMURRER; EXECUTION, 1, 2, 4; FRAUDULENT CONVEYANCE, 2; HABEAS CORPUS; INJUNCTION, 4, 7, 8; JUDGMENT, 1, 2; JUSTICE OF THE PEACE, 2; MALPRACTICE; MORTGAGE, 1; NEGLIGENCE, 5; PRACTICE, 9, 10, 12; PROMISSORY NOTE, 1, 4, 8, 9, 13, 14, 16, 18; QUIETING TITLE; REAL ESTATE,

ACTION TO RECOVER, 5; REPLEVIN, 2; REVIEW OF JUDGMENT, 1, 2, 4; SEDUCTION, 2; SET-OFF, 3, 5; SLANDER; SPECIAL FINDING; SUPREME COURT, 7, 10; TAXES; TOWN, 1; VENDOR AND VENDEE, 4, 5, 8, 9; WILL, 3.

1. *Defects Cured by Verdict.*—Where a complaint is defective, but contains such facts as will enable the court to remedy the defect by reasonable intendment, it will be held good after verdict. *Puett v. Beard*, 104
2. *Former Recovery.*—An answer of former recovery is bad which merely avers that, in a former suit upon the same cause of action, the defendant, by agreement, recovered judgment for costs. *Reed v. Higgins*, 143
3. *Arrest of Judgment.—Practice.—Special Contract.—Attorney.*—That a complaint is not sufficiently specific in stating the cause of action, as that its averments imply a special contract for the payment of a salary to an attorney, without stating the terms of the contract, will not justify a motion in arrest of judgment. *Yeoman v. Davis*, 189
4. *Demurrer.*—A demurrer does not admit all the statements contained in a complaint, but admits only such as are properly or sufficiently pleaded. *Platter v. City of Seymour*, 323
5. *Same.—Construction of Pleading.*—A pleading is to be construed according to its general tenor and scope, and the construction is not to be controlled by impertinent or isolated statements. *Ib.*
6. *Same.—Complaint Framed on One Distinct Theory.*—Where the complaint proceeds on a distinct theory, it must be construed with reference to that theory, and according to the general scope of its averments. *Ib.*
7. *Agreement.—Presumption.*—Under the code, the averment of facts from which the law will presume an agreement is equivalent to an averment that such agreement was made. *Starret v. Burkhalter*, 439

POSSESSION.

See MARRIED WOMAN, 3, 12; NEGLIGENCE, 6; REAL ESTATE, ACTION TO RECOVER, 1, 3; REPLEVIN; SCHOOL LAW; WILL, 1.

PRACTICE.

See AGREED CASE; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 1, 2, 10; DECEDENTS' ESTATES, 7, 8; DEMURRER; HARMLESS ERROR; HIGHWAY, 4, 5; INSTRUCTIONS TO JURY; JUDGE, 3 to 5; JUSTICE OF THE PEACE, 2 to 4; MANDATE; NEW TRIAL; PARTITION, 3; PROMISSORY NOTE, 8; REAL ESTATE, ACTION TO RECOVER; REVIEW OF JUDGMENT; SET-OFF, 3; SPECIAL FINDING; STATUTE OF LIMITATIONS; SUPREME COURT; TRIAL; VENDOR AND VENDEE, 3; VENIRE DE NOVO; VERDICT; WITNESS, 1, 4.

1. *Right of Court to Instruct Jury Where There is no Evidence.*—The trial court may withdraw a case from the jury when there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them. *Purcell v. English*, 34
2. *Same.—Instructions, Where Negligence is the Issue.*—Where there is no dispute as to the facts, and the question of negligence becomes one of law, the court may withdraw the case from the jury. *Ib.*
3. *Same.—Rule Where Court Directs Verdict.*—The rule in cases where the court instructs a jury to return a verdict is substantially the same as in cases of demurrer to evidence. *Ib.*
4. *Right of Recovery.*—Recovery must be on the cause of action declared on; a plaintiff can not declare on one cause of action and recover on another. *Ib.*
5. *Argument of Counsel.*—It is the duty of counsel to take the facts from the evidence, and not to place facts not proved by or inferable from the evidence before the jury. *Baldwin v. Bricker*, 221

6. *Same.—Reading of Extracts from Books.—Illustration.—Courts.—Presumptions.*—It is not proper for counsel to read extracts from books or newspapers; but, for the sole purpose of illustrating an argument, a printed slip of paper may, in some cases, be used. In the absence of a contrary showing, the presumptions are in favor of the conduct of the trial court. *Ib.*
7. *Rules of Court.—Change of Venue.—Judge.*—A rule of court requiring applications for change of venue to be made by the second Tuesday of the term, unless cause be shown for delay, is valid, and applies where the application seeks a change from the judge. *Thompson v. Pershing, 303*
8. *Same.—New Trial.—Causes Discovered After Term.*—There can be no error in dismissing an application for a new trial under section 563, R. S. 1881, which shows no cause for a new trial. *Ib.*
9. *Same.—Motion to Strike Out Amended Complaint.*—Where a demurrer has been sustained to a complaint for a new trial under section 563, R. S. 1881, there is no error in striking out an amended complaint afterwards filed containing the same facts. *Ib.*
10. *Pleading.—Motion to Strike Out.—Demurrer.*—Under the code, a motion to strike out will not perform the office of a demurrer in testing the sufficiency of a paragraph of answer. *McCammack v. McCammack, 387*
11. *Same.—Newly-Discovered Evidence.—Diligence.*—Where newly-discovered evidence is assigned as cause for a new trial, the affidavits filed therewith must show that the party could not, with reasonable diligence, have discovered and produced such evidence at the trial, or they will not be sufficient to sustain such cause for a new trial. *Ib.*
12. *Sham Pleadings.—Sham Defences.—Motion to Reject.—Answers to Special Interrogatories.*—Under section 77 of the civil code of 1852, the power of the court to reject sham pleadings only applied to sham defences; but, under section 382, R. S. 1881, the rule is different, and the court may now reject an answer or any other pleading as sham, when it plainly appears upon its face to be false in fact, or is shown to be so by the answers of the party to special written interrogatories, propounded to him to ascertain whether the pleading is false. *Lowe v. Thompson, 503*

PRESCRIPTION.

See NUISANCE, 1.

PRESUMPTION.

See BILL OF EXCEPTIONS, 8; CITY, 9; HUSBAND AND WIFE, 2; INJUNCTION, 5; JUDGE, 2; JUDGMENT, 8, 10; PARTITION, 1; PRACTICE, 6; SHERIFF'S SALE, 5.

Common Law.—Foreign State.—Where the transaction, which is the subject of the action, is governed by the laws of the State of *West Virginia*, and no statute of that State is pleaded or given in evidence, it will be presumed that the common law is the law of such State and governs the transaction. *Rogers v. Zook, 237*

PRINCIPAL AND AGENT.

See HUSBAND AND WIFE, 1.

PRINCIPAL AND SURETY.

See MORTGAGE, 2; PROMISSORY NOTE, 1, 10, 18, 19; SET-OFF, 5.

Notice to Sue.—Discharge of Surety.—Statute Construed.—Promissory Note.—Decedents' Estates.—Suit brought in June, 1881, on a promissory note against one of two makers, averring the death and insolvency of the other. Answer, that the defendant executed the note as surety for the deceased maker, who died in the county the owner of a large estate there, and that the plaintiff was his administrator, the estate yet being unsettled and pending in that court; that in January, 1880, after such

death, the defendant served a notice on the plaintiff to sue forthwith, pursuant to R. S. 1881, section 1210; that the plaintiff did not sue within a reasonable time, or bring any proceeding upon the note until the institution of this suit.

Held, that the answer was good under the statute. *Daily v. Robinson*, 382

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION.

PROMISE.

See LANDLORD AND TENANT, 2.

PROMISSORY NOTE.

See DECEDENTS' ESTATES, 1, 2; MORTGAGE, 3; PAYMENT, 2; PRINCIPAL AND SURETY.

1. *Principal and Surety.—Answer.—Extension of Time.—Notice.*—Where suretyship is not apparent on the face of a note, a surety is not released from liability thereon by an extension of the time of payment thereof, unless the payee has knowledge of the suretyship; and an answer setting up such a defence in a suit must aver such notice.
Tharp v. Parker, 102
2. *Defence by One who Negligently Signs.*—One who is guilty of negligence in the execution of a promissory note can not defend against it in the hands of a *bona fide* holder who obtains it for value, before maturity and without notice.
Baldwin v. Bricker, 221
3. *Same.—What Constitutes Negligence.*—It is in general true that a man who does not read, or cause to be read to him, an instrument which he signs, is guilty of negligence; but there may be peculiar cases where such a failure is not negligence, and where the signer may rely on the representations of the person with whom he deals.
Ib.
4. *Endorser and Endorsee.—Endorser's Liability.—Pleading.*—In a suit by the endorsee against the endorser of a promissory note, an averment in the complaint that the maker of the note was, when it was assigned, and still is, "wholly insolvent, having no property subject to execution," sufficiently shows that a suit against the maker would have been fruitless, and was needless to charge the assignor.
Schmied v. Frank, 250
5. *Same.—Diligence.—Parol Agreement.—Evidence.—Mortgage.—Foreclosure Sale.—Value.*—A parol agreement and direction by the assignor, at the time of assigning a promissory note, that the assignee shall not sue the maker until requested, that the assignor would stand liable as such without suit until he gave notice to sue, is not void; it does not vary the effect of the written endorsement, but merely fixes the degree of diligence required of the assignee to hold the assignor, and in a suit against the assignee is admissible in evidence, if alleged in the complaint; and, in such case, evidence by the assignee that land mortgaged to secure the note, which, on foreclosure not promptly obtained, sold for \$1, was at the time of the assignment worth enough to satisfy the note and all older liens, is not admissible, and the sum realized by the sale must be taken as the value when sold.
Ib.
6. *Same.—Evidence of Insolvency.—Harmless Error.*—In a suit by the endorsee against the endorser of a note, evidence of reputation to prove the maker's insolvency is not admissible; but, if admitted, the error is harmless, where such insolvency is distinctly shown by proper evidence, without any opposing testimony.
Ib.
7. *Same.—Measure of Damages.—Interest.*—The measure of damages, in a suit by the endorsee against the endorser of a promissory note, not negotiable by the law merchant, is the amount paid for the note with interest, and not the amount of the note itself.
Ib.

8. *Partial Answer to Complaint.*—In a suit upon two promissory notes, an answer purporting to bar the action, which at most only alleges matter in defence of one of the notes, is insufficient on demurrer.
Dourney v. Lee, 260
9. *Same.—False Representations.*—In such action an answer that the makers of the note purchased a machine which failed to work as represented, etc., without averring that the note was given for the machine, is insufficient on demurrer.
Ib.
10. *Principal and Surety.—Agreement.—Consideration.—Mortgage.—Release.—Judgment.—Execution.*—M. and D. executed their joint note to another, D. being in fact surety of M. Afterwards, in consideration that M. execute with D. a release of a mortgage held by both against another party, D. agreed to pay the note. D. received from the mortgagor lands to the amount of the mortgage so released; but liens on these lands were afterwards discovered which D. was compelled to pay, equal in amount to the price at which he took the lands, and therefore he never delivered the release to the mortgagor.
Held, that the agreement of D. to pay the note was founded on a sufficient consideration; that there was no failure of that consideration, and the agreement of D. with M. to pay the note so changed their relations that, in equity, M. became the surety of D.
Held, also, that, in a suit against both on the note, M. might establish the facts and obtain an order under the statute (R. S. 1881, section 1212), that execution on the judgment should be first levied on D.'s property.
McTaggart v. Dolan, 314
11. *Negligence.*—One who negligently executes a note negotiable by the law merchant can not defend against it in the hands of a *bona fide* holder; and ordinarily one who executes a note without reading it or having it read to him is guilty of negligence.
Baldwin v. Barrows, 351
12. *Want of Consideration.—Evidence.*—The defence of want of consideration for a note sued on is sustained by evidence that the thing given the defendant for his note was utterly worthless.
Arnold v. Will, 367
13. *Payable in Bank in this State.—Inland Bill of Exchange.—Suit by Endorsee Against Maker.—Complaint.*—In a suit by the endorsee against the maker of a promissory note payable at a bank in this State and negotiable as an inland bill of exchange, the complaint will be sufficient, even on demurrer for want of facts, if it allege the making of the note by the defendant, a copy of which is therewith filed, the endorsement of such note to the plaintiff, and that it is due and unpaid.
Coffing v. Hardy, 369
14. *Same.—Sufficiency of Answer.—Consideration.—Demurrer.*—In such a suit an answer that the note in suit was given without any consideration whatever is bad on demurrer for the want of sufficient facts.
Ib.
15. *Same.—Law Merchant.—Equities and Defences.*—Under the law merchant which governs the negotiability of inland bills of exchange and fixes the liabilities of the parties thereto, the endorsee before maturity, in good faith and without notice, of a promissory note payable in a bank in this State, takes the same as against the maker thereof freed from all the equities and defences which may have existed between such maker and the payee thereof.
Ib.
16. *Same.—Bank in this State.—Defence.—Evidence.*—Where the note in suit purports on its face to be payable in a bank in this State, and it is claimed that such bank is not a bank within the meaning of the statute, this is matter of defence to be shown by the defendant in his answer and evidence.
Ib.
17. *Payable in Bank in this State.—Negligence.—Bona Fide Endorsee before Maturity.*—The maker of a promissory note, payable to order or bearer

in a bank in this State and negotiable as an inland bill of exchange, is liable to a *bona fide* endorsee thereof for value before maturity, if such maker was guilty of negligence in failing to use reasonable care to inform himself of the contents of such note. *Yeugley v. Webb, 424*

18. *Release of Surety.—Interest.—Extension of Time.—Answer.*—An answer by a surety to a suit on a note, that he was such surety, of which the payee had notice; that, without his knowledge or consent, the payee received from the principal, after maturity of the note, to wit, on, etc., a given sum as and for interest on the note one month in advance from that date, whereby the time of payment was extended, is good on demurrer. *Starret v. Burkhalter, 439*
19. *Same.—Decedents' Estates.—Witness.—Competency.*—In a suit by the payee of a note against the executor of the surety, the principal maker of the note was a competent witness, under the statute in force prior to 1881, to prove that the surety had been discharged by giving time; but, in such case, the payee was not a competent witness for himself, unless required by the court to testify. *Ib.*
20. *Contract.—Sale.*—A party purchasing property at an agreed price, and giving his note therefor, can not maintain a defence upon the ground merely that he agreed to pay too much. *Huffman v. Cauble, 591*

PUBLIC INDECENCY.

See CRIMINAL LAW, 6.

PUBLIC POLICY.

See MECHANIC'S LIEN, 2.

PUBLIC WORK.

See CITY, 6 to 8.

QUESTION OF FACT.

See INTEREST; MARRIED WOMAN, 11; NEGLIGENCE, 3.

QUIETING TITLE.

See MARRIED WOMAN, 4, 5, 9, 12; REAL ESTATE, ACTION TO RECOVER, 1; VENDOR AND VENDEE, 5.

1. *Pleading.—General and Special Averments.—Complaint to Quiet Title.*—A complaint to quiet title, which avers generally that the plaintiff is seized in fee simple, and then proceeds to set forth the facts which constitute his title, is bad on demurrer, if the facts so stated do not show title in him. *Keepser v. Force, 81*
2. *Same.—Tax Title.*—An averment in a complaint in an action to quiet title to real estate, that the plaintiff "claims title by a tax deed and sale by the county auditor of P. county (where the lands are), which deed is recorded," etc., is insufficient to show title in him. *Ib.*
3. *Complaint.*—A complaint to quiet title, which fails to aver that the defendant makes any claim to the title or possession, is insufficient. *Nutter v. Fouch, 451*

RAILROAD.

See CRIMINAL LAW, 3; NEGLIGENCE, 5, 6; NUISANCE, 3.

Public Aid.—Mandate.—County Commissioners.—Relator.—Party.—A township had regularly voted aid for the construction of a railroad in a definite sum, as authorized by statute, R. S. 1881, section 4045. A tax of one per cent. upon the taxables of the township was levied for two years successively to raise the sum appropriated, as the statute provides, section 4056; but, owing to a shrinkage in the aggregate of taxables, these levies did not produce money sufficient to meet the whole sum appropriated.

Held, that mandate would lie to compel the board of county commissioners to make the necessary additional levy.

Held, also, that a taxpayer of the township was a proper relator to prosecute the suit. *Board, etc., v. State, ex rel., 8*

REAL ESTATE.

See DECEDENTS' ESTATES, 3 to 5; DEED; DESCENTS; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, 2; INJUNCTION, 8; JUDGMENT, 9; JUSTICE OF THE PEACE, 1, 2; MARRIED WOMAN; PARTITION; PROMISSORY NOTE, 5, 10; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER; SCHOOL LAW; SHERIFF'S SALE; VENDOR AND VENDEE; WILL, 1, 2, 6 to 8.

REAL ESTATE, ACTION TO RECOVER.

See JUSTICE OF THE PEACE, 1, 2; MARRIED WOMAN, 7, 8; STATUTE OF LIMITATIONS.

1. *Quieting Title.—General Finding May Show Basis.—Practice.*—In an action to recover or quiet the title to real estate, when the general denial is pleaded, it is proper that a general finding or verdict show upon what ground it was based, as that the deed, under which the plaintiff claimed title, was made when the possession was held adversely to the grantor. *Evans v. Schafer, 135*
2. *Same.—Judgment, Clause Limiting Effect of.—Motion to Modify.*—A clause in a judgment for the defendant, in an action to recover real estate, to the effect that the judgment shall not prejudice the rights of the parties as to any other action, practically nullifies the judgment, and on motion should have been stricken out or modified. *Ib.*
3. *Possession Admitted by Appearance and Pleading.*—By appearing and pleading to a complaint for the recovery of real estate, though by the general denial, a defendant admits for the purposes of the action his possession of the property. *Holman v. Elliott, 231*
4. *Same.—Disclaimer.—Practice.—Judgment.*—In such an action a defendant may disclaim as to all or as to any part of the lands sought to be recovered, but if he join his co-defendants in a general denial of the complaint, he must stand or fall by the issue, and if the plaintiff prevails in respect to any part of the lands in question, he is entitled to judgment against such defendant though he had not in fact claimed or had possession of the land recovered. *Ib.*
5. *Pleading.—Copy of Deed.*—In an action to recover land for breach of conditions contained in a defeasance executed by the grantee of a deed, a copy of the deed need not be made a part of the complaint. *Wilson v. Wilson, 472*
6. *Same.—Improvements.—Rents and Profits.*—In an action for the recovery of land for breach of conditions subsequent, there may be an accounting as to rents and improvements, and the fact of improvements can not be used as a bar to the action, though made by a subsequent purchaser of the land. *Ib.*

RECEIPT.

See PARTNERSHIP.

RECEIVER.

See INJUNCTION, 5.

RECOGNIZANCE BOND.

See CRIMINAL LAW, 8.

RECORD.

See BILL OF EXCEPTIONS; INJUNCTION, 6; NEW TRIAL; SUPREME COURT.

REDEMPTION.

See VENDOR AND VENDEE, 1.

REFORMATION.

See DEED, 1 to 3; SHERIFF'S SALE, 2.

RELATOR.

See RAILROAD.

RELEASE OF SURETY.

See PROMISSORY NOTE, 10, 18, 19.

RENTS.

See REAL ESTATE, ACTION TO RECOVER, 6.

REPEAL OF STATUTE.

See CITY, 15; CRIMINAL LAW, 7, 9; JUDGE, 1; JUDGMENT, 8; STATUTE.

REPLEVIN.

1. *Surrender of Property.—Nominal Damages.*—Where, in an action of replevin, by the admission of the defendant, testifying as a witness, that he had surrendered part of the property sued for after the commencement of the suit, there being no other evidence, there should be a finding that the plaintiff is entitled to its possession and to at least nominal damages for its detention. *Cardwill v. Gilmore, 428*
2. *Joint Ownership.—Complaint.—Demurrer.*—Where the plaintiff sues to recover the possession of a specific share and certain quantity of wheat, of which he alleges that he is the owner and entitled to the possession, and that defendant has possession thereof without right, and unlawfully detains the same from the plaintiff, the complaint is sufficient to withstand a demurrer thereto for the want of facts. The joint ownership of the wheat by the plaintiff and defendant, if it exists, is not apparent on the face of the complaint, and is matter of defence to be shown by the answer. *Ingel v. Scott, 518*

REPLEVIN BAIL.

See JUDGMENT, 5, 7.

RES ADJUDICATA.

See MALPRACTICE, 2, 3; SUPREME COURT, 6.

RES GESTÆ.

See EVIDENCE, 1 to 3.

RESTRAINT OF TRADE.

See INJUNCTION, 1, 2.

REVERSION.

See DESCENTS.

REVIEW OF JUDGMENT.

See MORTGAGE, 1.

1. *Complaint.—Causes.—Default.*—A complaint to review a judgment by default for error of law will lie only for such errors as might be available in the Supreme Court on appeal, viz.: 1. That the court rendering the judgment had no jurisdiction of the subject-matter. 2. That the facts averred in the complaint did not make a cause of action. Error in the form of a judgment by default, or a defect in the title of the complaint on which such judgment was rendered, are not sufficient grounds for review. *Shoaf v. Joray, 70*
2. *Same.—Complaint for Foreclosure of Mortgage.*—A complaint good for

the foreclosure of a mortgage, but not sufficient to warrant a personal judgment, is sufficient to resist a review of a judgment of foreclosure and *in personam* by default, which is sought on the ground that the facts in the complaint did not show a cause of action. *Ib.*

3. *Appeal*.—Where, in a proceeding to review a judgment for error of law, the judgment is reversed, an appeal from such judgment of reversal lies to the Supreme Court. *Keepfer v. Force, 81*
4. *New Matter*.—*Diligence*.—*Complaint*.—*Married Women*.—A complaint for review of a judgment for newly-discovered matter, under section 617, R. S. 1881, must show, not merely by averring in the language of the statute, but by facts alleged, that the new matter could not, by reasonably active diligence, have been discovered before the rendition of the judgment. This rule applies to married women as well as to others. *Debolt v. Debolt, 521*

RIGHT OF WAY.

See NEGLIGENCE, 6.

SALE.

See ATTACHMENT, 2; DECEDENTS' ESTATES, 4, 5; INJUNCTION, 8; MARRIED WOMAN, 1, 2; PARTITION, 5; PROMISSORY NOTE, 5, 20; QUIETING TITLE, 2; SHERIFF'S SALE; VENDOR AND VENDEE, 5; WILL, 8.

SCHOOL LAW.

See COUNTY SUPERINTENDENT; TOWN, 2 to 4, 6, 7.

1. *Common Schools*.—*Towns*.—*School Corporation*.—*Ownership of School-House*.—*Title to Real Estate*.—*Trust and Trustee*.—In 1849 a school district purchased and took title to two lots in the village of L., situated in the district, for the use of the district, for a school-house. Under the act of 1852, P. school township, in which was the village, took possession of the property, and held it until 1876, when the village of L. became an incorporated town, the township meantime erecting a valuable school-house thereon.
Held, that the school township was, from the taking effect of the school law of 1852, seized of the property as trustee by statute, as successor of the school district, until the village became incorporated, when the school town thus created became such trustee by statute, as the successor of the township (the property being within its territory), and thereby acquired the exclusive right to its possession and control.
School Town of Leesburgh v. Plain School T'p, 582
2. *Same*.—Under the Constitution and laws of this State, school property is held in trust for school purposes by those authorized, for the time being, to control it; and the Legislature may at any time change the trustee. *Ib.*

SEDUCTION.

1. *Action by Woman*.—*Damages*.—*Evidence*.—*Pecuniary Condition of Defendant*.—In an action by a woman for her own seduction, evidence of the pecuniary circumstances of the defendant may be considered in determining compensatory damages. *Wilson v. Shepler, 275*
2. *Pleading*.—*Quære*, What is a sufficient complaint by a woman for her own seduction? *Ib.*

SET-OFF.

See ATTORNEY, 1; BANKRUPTCY; TAXES.

1. *Judgment*.—*Exemption*.—Where one who is entitled to claim property as exempt from execution has no property save a judgment for less than the amount exempt by statute, the judgment defendant will not be permitted to satisfy it by set-off of a judgment against him. *Puett v. Beard, 172*

2. *Same.—Champerty.—Assignor and Assignee.*—One who advances money to a suitor to maintain an action in which the former has no interest, upon an agreement to receive satisfaction by a transfer of the judgment obtained, is guilty of champerty, and an assignment accordingly will be subject to the right of the judgment debtor to set off a judgment held by him at the time against the assignor. *Ib.*
3. *Same.—Practice.—Pleading.*—Judgments may be set off against each other by motion; but where formal pleadings are resorted to without objection, they may properly be tested by demurrer, as in ordinary causes. *Ib.*
4. *Same.—Judgments on Contract and in Tort.*—A judgment founded upon contract may be set off against one arising out of a tort. *Ib.*
5. *Guardian's Bond.—Pleading.—Principal and Surety.—Decedents' Estates.*—In an action upon the bond of a deceased guardian the sureties may plead, by way of set-off, an indebtedness of the estate of the relatrix to the estate of their principal. *State, ex rel., v. Wylie, 326*
6. *Equity.*—Whenever it is necessary to effect a clear equity or avoid irremediable injustice, set-off will be allowed though the debts be not mutual. *Cosgrove v. Cosby, 511*

SETTLEMENT.

See JUDGMENT, 10.

A settlement, in the absence of fraud or mistake, concludes the parties, not as to all dealings not expressly excluded, but only as to such as they intended to settle. *Huffman v. Cauble, 591*

SHERIFF.

See SHERIFF'S SALE.

1. *Failure to Levy Execution.—Special Findings.—Evidence.—Conclusions of Law.—Exception.*—Where the court, finding the facts specially, in an action against a sheriff for failure to levy an execution, finds that the sheriff made a certain return to an execution, and copies such return, this is not a finding of the facts stated in the return, but merely a finding of evidence, and an exception to conclusions of law, which exception is good only if the facts stated in the return are true, should be overruled. *Hessong v. Pressley, 555*
2. *Same.—Nominal Damages.*—A sheriff, having for service several executions against a party who has goods subject to levy, but not sufficient to satisfy the senior writs, is liable to the plaintiff in the junior writ for failure to levy, but for nominal damages only. *Ib.*
3. *Same.—Return.—Evidence.*—Facts stated by a sheriff in his return to an execution, as a reason why he did not levy, are not to be deemed conclusively true even as against the sheriff himself. *Ib.*

SHERIFF'S SALE.

See PARTITION, 5; PROMISSORY NOTE, 5; VENDOR AND VENDEE, 5; WILL, 8.

1. *Purchase by Execution Plaintiff.*—An execution plaintiff who purchases at the sale made on his own judgment is a *bona fide* purchaser in such a sense as to be protected against prior equities. *Vitito v. Hamilton, 187*
2. *Same.—Mortgage.—Mistake.—Description.—Reformation.—Right of Purchaser at Sheriff's Sale.*—A mistake in the description of mortgaged premises can not be corrected against a *bona fide* purchaser at a sheriff's sale who has acquired title without notice of the mistake. *Ib.*
3. *Description.—Return on Execution.*—A description, "twenty-eight feet off of the west side of lot number five, in block L, in the city of Seymour, Jackson county, Indiana," is sufficient, in the return on an execution. *Bond v. Heuser, 398*

4. *Same.*—An imperfect description of one tract of land in a sheriff's return on an execution of the sale of real estate does not invalidate the sale as to another separate and distinct parcel fully described in such return. *Ib.*
5. *Appraisement.—Return.—Evidence.—Presumption.*—A sheriff's sale of lands upon an execution subject to appraisement, where the return is silent as to the subject of appraisement, is supported *prima facie* by the presumption that the officer did his duty, and unless this presumption be overcome by sufficient evidence, the purchaser's title will be held good. *Hale v. Tulbott, 447*
6. *Married Woman.*—A purchaser at a sheriff's sale in 1855 of a husband's land on execution, under an ordinary judgment against him alone, took it free from any claim of the wife during the husband's lifetime, and forever free therefrom upon her death leaving the husband surviving, but subject to her right to a one-third interest if she should survive the husband. *Nutter v. Fouch, 451*
7. *Title.*—A purchaser at a sheriff's sale, as a general rule, acquires only the estate which the debtor possessed. *Miller v. Noble, 527*

SLANDER.

1. *Pleading.—Complaint.*—A complaint that the defendant spoke concerning the plaintiff the words, "Perry stole my corn (meaning the plaintiff)," is not bad for want of an averment that the conversation was about the plaintiff, and was so understood by the hearer. *Wilson v. McCrory, 170*
2. *Same.*—In order to be slanderous and actionable *per se*, the words spoken need not in themselves constitute a technical charge of a crime. *Ib.*

SPECIAL FINDING.

See SHERIFF, 1; VENIRE DE NOVO; VERDICT.

Outside of Complaint.—Conclusion of Law.—Secundum Allegata et Probata.—When the facts specially found by the court are outside of the complaint, and make a case entirely different from the case stated in the complaint, the court's conclusion of law thereon must be a finding for the defendant. The plaintiff must recover upon and according to the allegations of his complaint, or not at all. *Thomas v. Dale, 435*

SPECIAL VERDICT.

See SUPREME COURT, 12.

STATE BONDS.

See INTEREST.

STATUTE.

See HABEAS CORPUS; TOWN, 5, 6.

Repeal of.—Purview of Act.—The purview of an act begins with its enacting clause and ends before the repealing clause; and an act repealing acts and parts of acts within its purview repeals all acts in relation to cases provided for by the repealing act, but not acts or parts of acts in relation to cases not so provided for. *Williams v. State, ex rel., 400*

STATUTE CONSTRUED.

See ATTACHMENT, 1, 2; CITY, 3, 15, 19; COUNTY AUDITOR; COUNTY SUPERINTENDENT; CRIMINAL LAW, 7, 9, 10; DESCENTS; HIGHWAY, 1; MANDATE, 1; MARRIED WOMAN, 1, 2; PRINCIPAL AND SUBETY; TOWN, 5, 6; TOWNSHIP TRUSTEE; TRIAL; WITNESS, 3.

STATUTE OF LIMITATIONS.

See MARRIED WOMAN, 5, 7, 9, 12.

Demurrer.—Practice.—The purchaser of lands from heirs can not invoke the statute of limitations, R. S. 1881, section 2575, by demurrer to a complaint for their recovery, unless the complaint shows that the case is not within any of the exceptions to the statute. *Biggs v. McCarty*, 352

STOCKHOLDER.

See CITY, 15.

STREET.

See CITY, 9 to 14; CRIMINAL LAW, 3; NUISANCE, 2, 3.

SUPERIOR COURT.

See AGREED CASE, 2.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 1; DECEDENTS' ESTATES, 7, 8; HARMLESS ERROR; HIGHWAY, 4; INJUNCTION, 5, 6; MANDATE, 2, 3; NEW TRIAL; REVIEW OF JUDGMENT, 1.

1. *Reversal of Judgment.*—When it appears to the Supreme court that there are no errors or defects in the record of the cause which affect the substantial rights of the appellants, and that the merits of the cause have been fairly tried and determined in the court below, under the provisions of sections 398 and 658, R. S. 1881, the reversal of the judgment, in whole or in part, is positively forbidden. *Gardner v. Haney*, 17
2. *Dismissal.—Submission.—Waiver.*—A motion to dismiss an appeal because the certificate to the transcript is insufficient, and because the appellant has not numbered the pages of the transcript, and has not placed marginal notes upon them, will not be sustained after a joinder in error and the cause has been submitted by agreement. *Cooper v. Cooper*, 75
3. *Instructions.—Practice.—Error.*—The refusal to give instructions can present no question in the Supreme Court, unless the record shows affirmatively that they were asked in apt time, and that they were not embraced in other instructions actually given, which must appear by setting out all of the latter. *Puett v. Beard*, 104
4. *Rehearing.—Transcript.*—A rehearing will not be granted to enable a party to obtain a corrected transcript. *Burgett v. Bothwell*, 149
5. *Same.*—The Supreme Court will not decide questions not arising in the record. *Ib.*
6. *Judgment.—Res Adjudicata.*—The judgment of the Supreme Court upon a question directly presented by the record settles that question in all subsequent proceedings in that cause. *Board, etc., v. Jameson*, 154
7. *Demurrer.—Record.—Amendment.—Bill of Exceptions.*—In reviewing a ruling upon a demurrer, the Supreme Court can consider the pleading only as it appears in the record; and if, after the ruling, the court permitted an amendment, the error of so doing, if error it was, should be shown by a bill of exceptions. *Lucas v. State, ex rel.*, 180
8. *Weight of Evidence.*—The Supreme Court will not disturb a judgment upon the mere weight of the evidence. *Hall v. Stanley*, 219
9. *Practice.—Instructions.*—Unless the instructions given by the court are all in the record, no question will be presented on the refusal to give instructions asked by the parties. *Baldwin v. Bricker*, 221
10. *Practice.—Failure of Party to Submit to Examination.—Striking out of Pleadings.—Witness.*—No question is presented upon the refusal of the circuit

- court to strike out a party's pleadings because of a failure to submit to examination, under section 510, R. S. 1881, unless the record shows that a good excuse for the failure was not offered. *Huffman v. Copeland*, 224
11. *Evidence.—Verdict.*—Where there is some evidence tending to support a verdict, and the verdict is supported by the action of the trial court in overruling a motion for a new trial, the Supreme Court will not disturb the judgment on the insufficiency of the evidence to sustain the verdict.
Lake Erie, etc., R. W. Co. v. Everett, 229
 12. *Special Verdict.—Evidence.*—In determining whether or not the proper judgment was rendered upon a special verdict, the Supreme Court can not consider the evidence.
Holman v. Elliott, 231
 13. *Instructions.—Verdict.—Harmless Error.*—When it appears that the verdict is right, and that an instruction not applicable to the evidence certainly did no harm, the Supreme Court will not reverse for the error in giving the instruction.
Ryman v. Crawford, 262
 14. *Appeal.—Parties.*—After submission of a cause by agreement, in the Supreme Court, it is too late to object that the proper parties to the appeal have not been made.
Hendricks v. Frank, 278
 15. *Bill of Exceptions.—Evidence.*—Questions dependent on the evidence will not be considered on appeal if it be apparent that parts of the evidence are not included in the bill of exceptions. *Nugen v. First Nat'l Bank*, 311
 16. *Nominal Damages.*—A reversal will not be adjudged where the only error is a refusal to give mere nominal damages. *Platter v. City of Seymour*, 323
 17. *Practice.—Instructions.*—Unless the instructions given by the court are all in the record, no question will be presented in the Supreme Court on the refusal to give instructions asked by the parties.
Baldwin v. Barrows, 351
 18. *Evidence.—Conflict.*—Where the evidence in a cause is in conflict, the Supreme Court must take as true that which the trial court by its finding declared to be true.
Arnold v. Will, 367
 19. *New Trial.—Weight of Evidence.—Verdict.*—Where the verdict of the jury is against the party who has the burden of the issues, and the evidence is conflicting, the Supreme Court will not grant a new trial upon the mere weight or sufficiency of evidence. *McCammack v. McCammack*, 387
 20. *Same.—Instructions Asked and Refused.—Must be Signed by Party or Attorney.*—Under the fourth clause of section 324 of the civil code of 1852 (section 533, R. S. 1881), when, at the conclusion of the evidence, either party desires special instructions to be given to the jury, such instructions must be reduced to writing, numbered and signed by such party or his attorney, and delivered to the court. If the instructions are not thus signed and are refused, the party asking them can not be heard to complain of such refusal in the Supreme Court. *Ib.*
 21. *Same.—Vague and Uncertain Causes for New Trial.—Reference to Bill of Exceptions not Signed or Filed.*—Where the written causes for a new trial are too vague, uncertain and imperfect to present any question for the decision of the trial court or of the Supreme Court, such causes can not be aided or perfected by reference therein to bills of exceptions not signed by the judge or filed as parts of the record at the time of the filing of such causes for a new trial. *Ib.*
 22. *Practice.—Evidence.*—Where there was evidence tending to support the finding, such finding can not be disturbed by the Supreme Court on the mere weight of the evidence.
State, ex rel., v. Wylie, 396
 23. *Weight of Evidence.—Verdict.*—Where the evidence in the record tends to sustain the verdict of the jury on every material point, the Supreme

- Court will not disturb the verdict nor reverse the judgment, on the weight or sufficiency of the evidence. *Wright v. Connelley*, 461
24. *Judgment*.—*Verdicts in Form or Substance*.—Where no objections are made the exceptions taken either to the form or substance of the verdict in the trial court may not be made or taken for the first time in the Supreme Court. *Boyd v. Scott*, 513
25. *Scire*.—*Exemption*.—*For a Jury*.—*Bill of Exemption*.—Unless the bill of exemption is timely served and is proper all the evidence given on the trial the Supreme Court will decide whether or not the finding of the jury is sustained by sufficient evidence. In such a case the word "sufficiency" is the equivalent of the word "evidence." *Ib.*
26. *Impeachment*.—Where a witness appears it is his duty to bring up a perfect transcript of the record and if an answer be omitted, the Supreme Court can not know what were the issues and, therefore, can not decide the effect of the verdict or answers of the jury to interrogatories or any question as to the admissibility or sufficiency of evidence, or the giving or refusal of instructions. *McDonnell v. McGinty*, 533
27. *Pretrial*.—*Surplusage*.—*Exemption*.—The refusal to strike out surplusage is not such an error as will warrant a reversal. *Laury v. McAlister*, 545

SURPLUSAGE

See SUPREME COURT, 27.

TAXES.

See CITY, 4, 17 to 19; COUNTY AUDITOR; DEED, 1; INSTRUCTIONS, 4, 8; QUIETING TITLE, 2; RAILROAD; TOWN.

Pleadings.—*City Taxes*.—*Insurance*.—Where, in an action upon a city order for the taxes, the city answers by way of set-off, that he is indebted to the city for taxes in a certain sum, but fails to allege any facts to show his or his property's liability to taxation, or the city's authority to levy and collect taxes such answer is insufficient on demurrer. *Chapman v. Chattanooga Hydraulic Co.*, 235

TAX DEED.

See DEED, 1, 2; QUIETING TITLE, 2

TAX TITLE

See QUIETING TITLE

TENANTS IN COMMON.

See WILL, 7.

TENDER.

See VENDOR AND VENDEE, 9.

TITLE

See PARTITION, 4; QUIETING TITLE; SCHOOL LAW; SHERIFF'S SALE; TOWN, 1; WILL, 8.

TITLE-BOND.

See VENDOR AND VENDEE, 8.

TORTS.

See CITY, 7; LANDLORD AND TENANT, 1, 2; MALPRACTICE; NEGLIGENCE; SET-OFF, 4.

TOWN.

See CRIMINAL LAW, 3; MANDATE, 1; NUISANCE, 2; SCHOOL LAW.

1. *Municipal Bonds*.—*Payable to Bearer*.—*Payable by Delivery*.—*Sufficiency*

- of Complaint.*—Municipal bonds, payable to bearer, are negotiable by delivery, and in an action thereon the complaint will be sufficient, if it allege that the plaintiff is the owner and holder thereof, and need not show how he acquired his title thereto. *Gardner v. Haney, 17*
2. *Incorporated Towns.—Bonds for School Buildings.—Payment of Interest and Principal.—Special Additional Tax.—Duty of Trustees.—Mandate.*—Under section 4490, R. S. 1881, it is the duty of the trustees of an incorporated town to levy annually a special additional tax sufficient to pay the interest and principal of the bonds of the town issued for school buildings, and falling due; and where it appears that the trustees of the town have failed, neglected and refused to discharge their statutory duty, a writ of mandate is the proper legal remedy. *Ib.*
 3. *Same.—Constitutional Law.—Title of Act.—Bonds Legalized.*—Section 4 of the act of March 8th, 1873, authorizing cities and towns to negotiate and sell bonds for the erection and completion of school buildings, which section legalizes and validates such bonds as had been executed under prior statutes, is matter properly connected with the subject expressed in the title of such act, and is a constitutional and valid section. *Ib.*
 4. *Same.—School Corporation.—Location of School-House.—Validity of Bonds.*—Each incorporated town is by law a school corporation, and, as a rule, the school-grounds and school-houses of such corporation should be located within the corporate limits of the town; but the bonds of such town, negotiated and sold to procure means for the erection and completion of a school-house for the town, are not *ultra vires* and void, merely because such school-house is not located within the corporate limits of such town. *Ib.*
 5. *Curative Statute.—Legalizing Elections in Incorporated Towns.—Constitutional Law.*—The act of March 13th, 1875 (Acts 1875, Spec. Sess., p. 74) to legalize the acts of boards of trustees and other officers of incorporated towns, where the inspectors of elections have failed to make the return of the election of such officers within the time prescribed by law, was not repugnant to any provision of either the State or Federal constitution, and, as a curative statute, was a constitutional and valid law. *Ib.*
 6. *School Trustees.—Election.—Legalizing Act.—Statute Construed.—Curative Act not Prospective.*—The act of March 13th, 1875, entitled "An act to legalize the acts of boards of trustees," etc.; "where the inspectors of elections have failed," etc., is retrospective and curative only. *Lucas v. State, ex rel., 180*
 7. *Same.—Town Treasurer.—Action.—Defence.—School Corporation.*—It is no defence to an action by a school corporation to recover its moneys of one who had intruded unlawfully into the office of treasurer of the corporation, that another is unlawfully holding that office. *Ib.*

TOWNSHIP TRUSTEE.

See COUNTY SUPERINTENDENT, 2, 3.

Overseer of Poor.—Compensation for Services.—Statute Construed.—The township trustee is *ex officio* overseer of the poor of his township; but, under the fee and salary acts of March 8th, 1873, and of March 12th, 1875, the compensation of the trustee, for all services rendered by him, was limited to the *per diem* allowance specified in such acts respectively, and was payable out of the township fund, and not out of the county funds. *Board, etc., v. Fischer, 139*

TRANSCRIPT.

See JUDGMENT, 3, 4; SUPREME COURT, 2, 4, 26.

TRESPASS.

See CITY, 7; INJUNCTION, 3.

TRIAL.

See CRIMINAL LAW, 11; JUDGE, 4.

Issues.—Practice.—Jury.—Count.—Fraud.—Contract.—Statute Construed.—

Complaint by several separate creditors of S., averring their respective claims upon account, and that S., being insolvent, had transferred his goods and claims (\$8,000) to other creditors, made defendants with S., upon a written agreement that after disposing of goods and collecting claims enough to satisfy their demands (\$2,000) they would return the residue to S. or his other creditors; that afterwards, without any new consideration, and without the knowledge or consent of the plaintiffs, and to defraud them, the written contract was so modified as to make the title of those other persons absolute, without any condition to return the property as was first agreed, and that they had converted all of it to their own use, and removed it beyond the reach of execution. Issues were made and tried by jury.

Held, that the suit was formerly of an exclusive equitable jurisdiction, and under section 409, R. S. 1881, should be tried by the court, and not by jury. *Hendricks v. Frank*, 278

TRUST AND TRUSTEE.

See SCHOOL LAW.

TURNPIKE COMPANY.

See NEGLIGENCE, 1.

ULTRA VIRES.

See CITY, 15.

VALUE.

See PROMISSORY NOTE, 5.

VENDOR AND VENDEE.

See DEED, 4, 5; STATUTE OF LIMITATIONS.

1. *Judgment Lien.—Notice.—Improvements.—Redemption.*—A purchaser of real estate must take notice of judgment liens, and if, in actual ignorance thereof, he purchases and makes valuable improvements, he can not, by paying upon the judgment the value of the property without the improvements, release the property from the lien of the judgment if not fully paid. *Taylor v. Morgan*, 295
2. *Married Woman.—Vendor's Lien.*—A woman's right in land in virtue of her marriage is subject to the lien of the vendor for the purchase-money thereof. *Nutter v. Fouch*, 451
3. *Same.—Remedy to Enforce Vendor's Lien.*—A vendor of land, having an equitable lien thereon for purchase-money, may seek his legal remedy upon his money demand, together with the enforcement of his lien in one action; but he may first pursue his remedy upon his legal claim alone, without thereby waiving his right to afterwards resort, if necessary, to the equitable enforcement of his lien. *Ib.*
4. *Same.—Complaint.—Evidence.*—A vendor's lien on land for unpaid purchase-money is not an original and absolute charge on the land, but only an equitable right to resort thereto if there be not sufficient personal assets; and in an action to enforce such lien, if the complaint do not allege and the evidence show that the vendee has no other property subject to execution, the judgment should not direct the sale of the land except in the event that no other property of the vendee, subject to execution, can be found to satisfy the execution. *Ib.*

5. *Same.*—*Husband and Wife.*—*Widow of Vendee.*—*Partition.*—*Quieting Title.*—*Counter-Claim.*—*Sheriff's Sale.*—In an action by a widow for partition and to quiet her title, as to an undivided third of a tract of land, an answer by the defendant, that he had sold the land, with other lands, on credit, to the plaintiff's husband; that for the unpaid purchase-money he obtained a personal judgment against the husband, who had no personal property, and, with his consent and that of the plaintiff, he purchased the tract in controversy on execution issued on his judgment, bidding the full amount thereof, and received a sheriff's deed therefor in 1855, and the husband died in 1866, is insufficient on demurrer; and the same facts are insufficient as a counter-claim, either to quiet the defendant's title or to enforce a vendor's lien. *Ib.*
6. *Same.*—*Judgment.*—*Waiver of Lien.*—Taking a personal judgment for the purchase-money of land, and selling the land on execution to satisfy it, is a waiver of the vendor's lien. *Ib.*
7. *Same.*—When the purchase-money is in any manner satisfied, the vendor's lien ceases, and can not afterwards be enforced. *Ib.*
8. *Title-Bond.*—*Executory Contract.*—*Action for Purchase-Money.*—*Pleading.*—*Insolvency.*—*Lien.*—In a suit by a vendor to enforce a lien for purchase-money against land, where he has given a title-bond for the conveyance thereof, it is not necessary, under section 275, R. S. 1881, to aver the insolvency of the purchaser. *Huffman v. Cauble, 591*
9. *Deed.*—*Tender.*—*Demand.*—Where a deed is tendered by the vendor under an executory contract, and the unpaid purchase-money demanded, and the vendee answers that he has no money, it is not necessary to state the exact amount demanded. *Ib.*

VENDOR'S LIEN.

See VENDOR AND VENDEE, 2 to 4.

VENIRE DE NOVO.

See VERDICT.

1. *Special Finding of Facts.*—*Practice.*—If a special finding of facts and conclusions of law thereon do not find the facts, but merely state the evidence, a *venire de novo* should be awarded. *Smith v. Goodwin, 300*
2. *Same.*—For such a defective finding by the court, see opinion. *Ib.*

VERDICT.

See BILL OF EXCEPTIONS, 6; PRACTICE, 3; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 8, 11 to 13, 19, 23, 26.

Venire de Novo.—*Practice.*—A *venire de novo* is awarded when the verdict is uncertain or ambiguous, or does not fully find upon the issues, or fails to assess damages. *Green v. Elliott, 53*

VOLUNTEER.

See DEED, 5.

WAIVER.

See JUDGMENT, 7; SUPREME COURT, 2; VENDOR AND VENDEE, 6, 7.

WARRANT.

See CITY, 1 to 5; TAXES.

WATER-WORKS COMPANY.

See CITY, 15.

WATER-WORKS TRUSTEES.

See CITY, 3.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 8, 19, 23.

WIDOW.

See DECEDENTS' ESTATES, 3; PARTITION, 1 to 3, 5; VENDOR AND VENDEE; WILL, 2, 3, 6.

WILL.

See INSANITY, 5.

1. *Legacy.—Devisees.—Real Estate.—Lien.—Possession.*—Devisees of land are not liable to an action for a legacy charged thereon until they have taken possession. Until then it is not due. *Wilson v. Moore, 244*
2. *Same.—Election.—Widow.*—Where it does not clearly appear from a will that the provision made for the widow was intended to be additional to her interest in her husband's lands, she must elect whether she will take under the will. Such election is a privilege to be exercised by the widow alone. Lapse of time will not affect her right to take under the law. *Ib.*
3. *Same.—Pleading.*—An allegation that a widow has not elected to take under the will is not equivalent to an allegation that she has elected not to take under the will, and has taken under the law. *Ib.*
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Held, also, that upon the death of said second child its moiety passed to its parents. *Biggs v. McCarty*, 352

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STATUTE OF LIMITATIONS.

See MARRIED WOMAN, 5, 7, 9, 12.

Demurrer.—Practice.—The purchaser of lands from heirs can not invoke the statute of limitations, R. S. 1881, section 2575, by demurrer to a complaint for their recovery, unless the complaint shows that the case is not within any of the exceptions to the statute. *Biggs v. McCarty*, 352

STOCKHOLDER.

See CITY, 15.

STREET.

See CITY, 9 to 14; CRIMINAL LAW, 3; NUISANCE, 2, 3.

SUPERIOR COURT.

See AGREED CASE, 2.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 1; DECEDENTS' ESTATES, 7, 8; HARMLESS ERROR; HIGHWAY, 4; INJUNCTION, 5, 6; MANDATE, 2, 3; NEW TRIAL; REVIEW OF JUDGMENT, 1.

1. *Reversal of Judgment.*—When it appears to the Supreme court that there are no errors or defects in the record of the cause which affect the substantial rights of the appellants, and that the merits of the cause have been fairly tried and determined in the court below, under the provisions of sections 398 and 658, R. S. 1881, the reversal of the judgment, in whole or in part, is positively forbidden. *Gardner v. Haney*, 17
2. *Dismissal.—Submission.—Waiver.*—A motion to dismiss an appeal because the certificate to the transcript is insufficient, and because the appellant has not numbered the pages of the transcript, and has not placed marginal notes upon them, will not be sustained after a joinder in error and the cause has been submitted by agreement. *Cooper v. Cooper*, 75
3. *Instructions.—Practice.—Error.*—The refusal to give instructions can present no question in the Supreme Court, unless the record shows affirmatively that they were asked in apt time, and that they were not embraced in other instructions actually given, which must appear by setting out all of the latter. *Puett v. Beard*, 104
4. *Rehearing.—Transcript.*—A rehearing will not be granted to enable a party to obtain a corrected transcript. *Burgett v. Bothwell*, 149
5. *Same.*—The Supreme Court will not decide questions not arising in the record. *Ib.*
6. *Judgment.—Res Adjudicata.*—The judgment of the Supreme Court upon a question directly presented by the record settles that question in all subsequent proceedings in that cause. *Board, etc., v. Jameson*, 154
7. *Demurrer.—Record.—Amendment.—Bill of Exceptions.*—In reviewing a ruling upon a demurrer, the Supreme Court can consider the pleading only as it appears in the record; and if, after the ruling, the court permitted an amendment, the error of so doing, if error it was, should be shown by a bill of exceptions. *Lucas v. State, ex rel.*, 180
8. *Weight of Evidence.*—The Supreme Court will not disturb a judgment upon the mere weight of the evidence. *Hall v. Stanley*, 219
9. *Practice.—Instructions.*—Unless the instructions given by the court are all in the record, no question will be presented on the refusal to give instructions asked by the parties. *Baldwin v. Bricker*, 221
10. *Practice.—Failure of Party to Submit to Examination.—Striking out of Pleadings.—Witness.*—No question is presented upon the refusal of the circuit

court to strike out a party's pleadings because of a failure to submit to examination, under section 510, R. S. 1881, unless the record shows that a good excuse for the failure was not offered. *Huffman v. Copeland*, 224

11. *Evidence.—Verdict.*—Where there is some evidence tending to support a verdict, and the verdict is supported by the action of the trial court in overruling a motion for a new trial, the Supreme Court will not disturb the judgment on the insufficiency of the evidence to sustain the verdict.
Lake Erie, etc., R. W. Co. v. Everett, 229
12. *Special Verdict.—Evidence.*—In determining whether or not the proper judgment was rendered upon a special verdict, the Supreme Court can not consider the evidence.
Holman v. Elliott, 231
13. *Instructions.—Verdict.—Harmless Error.*—When it appears that the verdict is right, and that an instruction not applicable to the evidence certainly did no harm, the Supreme Court will not reverse for the error in giving the instruction.
Ryman v. Crawford, 262
14. *Appeal.—Parties.*—After submission of a cause by agreement, in the Supreme Court, it is too late to object that the proper parties to the appeal have not been made.
Hendricks v. Frank, 278
15. *Bill of Exceptions.—Evidence.*—Questions dependent on the evidence will not be considered on appeal if it be apparent that parts of the evidence are not included in the bill of exceptions. *Nugen v. First Nat'l Bank*, 311
16. *Nominal Damages.*—A reversal will not be adjudged where the only error is a refusal to give mere nominal damages. *Platter v. City of Seymour*, 323
17. *Practice.—Instructions.*—Unless the instructions given by the court are all in the record, no question will be presented in the Supreme Court on the refusal to give instructions asked by the parties.
Baldwin v. Barrows, 351
18. *Evidence.—Conflict.*—Where the evidence in a cause is in conflict, the Supreme Court must take as true that which the trial court by its finding declared to be true.
Arnold v. Will, 367
19. *New Trial.—Weight of Evidence.—Verdict.*—Where the verdict of the jury is against the party who has the burden of the issues, and the evidence is conflicting, the Supreme Court will not grant a new trial upon the mere weight or sufficiency of evidence. *McCammack v. McCammack*, 387
20. *Same.—Instructions Asked and Refused.—Must be Signed by Party or Attorney.*—Under the fourth clause of section 324 of the civil code of 1852 (section 533, R. S. 1881), when, at the conclusion of the evidence, either party desires special instructions to be given to the jury, such instructions must be reduced to writing, numbered and signed by such party or his attorney, and delivered to the court. If the instructions are not thus signed and are refused, the party asking them can not be heard to complain of such refusal in the Supreme Court. *Ib.*
21. *Same.—Vague and Uncertain Causes for New Trial.—Reference to Bill of Exceptions not Signed or Filed.*—Where the written causes for a new trial are too vague, uncertain and imperfect to present any question for the decision of the trial court or of the Supreme Court, such causes can not be aided or perfected by reference therein to bills of exceptions not signed by the judge or filed as parts of the record at the time of the filing of such causes for a new trial. *Ib.*
22. *Practice.—Evidence.*—Where there was evidence tending to support the finding, such finding can not be disturbed by the Supreme Court on the mere weight of the evidence.
State, ex rel., v. Wylie, 396
23. *Weight of Evidence.—Verdict.*—Where the evidence in the record tends to sustain the verdict of the jury on every material point, the Supreme

- Court will not disturb the verdict, nor reverse the judgment, on the weight or sufficiency of the evidence. *Cornelius v. Coughlin*, 461
24. *Judgment.—Objections to Form or Substance.*—Where no objections are made, nor exceptions taken, either to the form or substance of the judgment in the circuit court, they can not be made or taken for the first time in the Supreme Court. *Ingel v. Scott*, 518
25. *Same.—Evidence.—Testimony.—Bill of Exceptions.*—Unless the bill of exceptions affirmatively shows that it contains all the evidence given on the trial, the Supreme Court will not consider the question whether or not the finding of the court is sustained by sufficient evidence. In such a case, the word "testimony" is not the equivalent of the word "evidence." *Ib.*
26. *Transcript.*—Where a defendant appeals, it is his duty to bring up a perfect transcript of the record, and if his answer be omitted, the Supreme Court can not know what were the issues, and, therefore, can not decide the effect of the verdict or answers of the jury to interrogatories, or any question as to the admissibility or sufficiency of evidence, or the giving or refusing of instructions. *McCardle v. McGinley*, 538
27. *Practice.—Surplusage.—Reversal.*—The refusal to strike out surplusage is not such an error as will warrant a reversal. *Lowry v. McAlister*, 543

SURPLUSAGE.

See SUPREME COURT, 27.

TAXES.

See CITY, 4, 17 to 19; COUNTY AUDITOR; DEED, 1; INJUNCTION, 4, 8; QUIETING TITLE, 2; RAILROAD; TOWN.

Pleading.—City Warrant.—Demurrer.—Where, in an action upon a city order by the holder, the city answers, by way of set-off, that he is indebted to the city for taxes in a certain sum, but fails to allege any facts showing his or his property's liability to taxation, or the city's authority to levy and collect taxes, such answer is insufficient on demurrer. *Connersville v. Connersville Hydraulic Co.*, 235

TAX DEED.

See DEED, 1, 2; QUIETING TITLE, 2.

TAX TITLE.

See QUIETING TITLE.

TENANTS IN COMMON.

See WILL, 7.

TENDER.

See VENDOR AND VENDEE, 9.

TITLE.

See PARTITION, 4; QUIETING TITLE; SCHOOL LAW; SHERIFF'S SALE; TOWN, 1; WILL, 8.

TITLE-BOND.

See VENDOR AND VENDEE, 8.

TORTS.

See CITY, 7; LANDLORD AND TENANT, 1, 2; MALPRACTICE; NEGLIGENCE; SET-OFF, 4.

TOWN.

See CRIMINAL LAW, 3; MANDATE, 1; NUISANCE, 2; SCHOOL LAW.

1. *Municipal Bonds.—Payable to Bearer.—Negotiable by Delivery.—Sufficiency*

- of Complaint.*—Municipal bonds, payable to bearer, are negotiable by delivery, and in an action thereon the complaint will be sufficient, if it allege that the plaintiff is the owner and holder thereof, and need not show how he acquired his title thereto. *Gardner v. Haney, 17*
2. *Incorporated Towns.—Bonds for School Buildings.—Payment of Interest and Principal.—Special Additional Tax.—Duty of Trustees.—Mandate.*—Under section 4490, R. S. 1881, it is the duty of the trustees of an incorporated town to levy annually a special additional tax sufficient to pay the interest and principal of the bonds of the town issued for school buildings, and falling due; and where it appears that the trustees of the town have failed, neglected and refused to discharge their statutory duty, a writ of mandate is the proper legal remedy. *Ib.*
 3. *Same.—Constitutional Law.—Title of Act.—Bonds Legalized.*—Section 4 of the act of March 8th, 1873, authorizing cities and towns to negotiate and sell bonds for the erection and completion of school buildings, which section legalizes and validates such bonds as had been executed under prior statutes, is matter properly connected with the subject expressed in the title of such act, and is a constitutional and valid section. *Ib.*
 4. *Same.—School Corporation.—Location of School-House.—Validity of Bonds.*—Each incorporated town is by law a school corporation, and, as a rule, the school-grounds and school-houses of such corporation should be located within the corporate limits of the town; but the bonds of such town, negotiated and sold to procure means for the erection and completion of a school-house for the town, are not *ultra vires* and void, merely because such school-house is not located within the corporate limits of such town. *Ib.*
 5. *Curative Statute.—Legalizing Elections in Incorporated Towns.—Constitutional Law.*—The act of March 13th, 1875 (Acts 1875, Spec. Sess., p. 74) to legalize the acts of boards of trustees and other officers of incorporated towns, where the inspectors of elections have failed to make the return of the election of such officers within the time prescribed by law, was not repugnant to any provision of either the State or Federal constitution, and, as a curative statute, was a constitutional and valid law. *Ib.*
 6. *School Trustees.—Election.—Legalizing Act.—Statute Construed.—Curative Act not Prospective.*—The act of March 13th, 1875, entitled "An act to legalize the acts of boards of trustees," etc.; "where the inspectors of elections have failed," etc., is retrospective and curative only. *Lucas v. State, ex rel., 180*
 7. *Same.—Town Treasurer.—Action.—Defence.—School Corporation.*—It is no defence to an action by a school corporation to recover its moneys of one who had intruded unlawfully into the office of treasurer of the corporation, that another is unlawfully holding that office. *Ib.*

TOWNSHIP TRUSTEE.

See COUNTY SUPERINTENDENT, 2, 3.

Overseer of Poor.—Compensation for Services.—Statute Construed.—The township trustee is *ex officio* overseer of the poor of his township; but, under the fee and salary acts of March 8th, 1873, and of March 12th, 1875, the compensation of the trustee, for all services rendered by him, was limited to the *per diem* allowance specified in such acts respectively, and was payable out of the township fund, and not out of the county funds. *Board, etc., v. Fischer, 139*

TRANSCRIPT.

See JUDGMENT, 3, 4; SUPREME COURT, 2, 4, 26.

TRESPASS.

See CITY, 7; INJUNCTION, 3.

TRIAL.

See CRIMINAL LAW, 11; JUDGE, 4.

Issues.—Practice.—Jury.—Count.—Fraud.—Contract.—Statute Construed.—

Complaint by several separate creditors of S., averring their respective claims upon account, and that S., being insolvent, had transferred his goods and claims (\$8,000) to other creditors, made defendants with S., upon a written agreement that after disposing of goods and collecting claims enough to satisfy their demands (\$2,000) they would return the residue to S. or his other creditors; that afterwards, without any new consideration, and without the knowledge or consent of the plaintiffs, and to defraud them, the written contract was so modified as to make the title of those other persons absolute, without any condition to return the property as was first agreed, and that they had converted all of it to their own use, and removed it beyond the reach of execution. Issues were made and tried by jury.

Held, that the suit was formerly of an exclusive equitable jurisdiction, and under section 409, R. S. 1881, should be tried by the court, and not by jury. *Hendricks v. Frank, 278*

TRUST AND TRUSTEE.

See SCHOOL LAW.

TURNPIKE COMPANY.

See NEGLIGENCE, 1.

ULTRA VIRES.

See CITY, 15.

VALUE.

See PROMISSORY NOTE, 5.

VENDOR AND VENDEE.

See DEED, 4, 5; STATUTE OF LIMITATIONS.

1. *Judgment Lien.—Notice.—Improvements.—Redemption.*—A purchaser of real estate must take notice of judgment liens, and if, in actual ignorance thereof, he purchases and makes valuable improvements, he can not, by paying upon the judgment the value of the property without the improvements, release the property from the lien of the judgment if not fully paid. *Taylor v. Morgan, 295*
2. *Married Woman.—Vendor's Lien.*—A woman's right in land in virtue of her marriage is subject to the lien of the vendor for the purchase-money thereof. *Nutter v. Fouch, 451*
3. *Same.—Remedy to Enforce Vendor's Lien.*—A vendor of land, having an equitable lien thereon for purchase-money, may seek his legal remedy upon his money demand, together with the enforcement of his lien in one action; but he may first pursue his remedy upon his legal claim alone, without thereby waiving his right to afterwards resort, if necessary, to the equitable enforcement of his lien. *Ib.*
4. *Same.—Complaint.—Evidence.*—A vendor's lien on land for unpaid purchase-money is not an original and absolute charge on the land, but only an equitable right to resort thereto if there be not sufficient personal assets; and in an action to enforce such lien, if the complaint do not allege and the evidence show that the vendee has no other property subject to execution, the judgment should not direct the sale of the land except in the event that no other property of the vendee, subject to execution, can be found to satisfy the execution. *Ib.*

5. *Same.*—*Husband and Wife.*—*Widow of Vendee.*—*Partition.*—*Quieting Title.*—*Counter-Claim.*—*Sheriff's Sale.*—In an action by a widow for partition and to quiet her title, as to an undivided third of a tract of land, an answer by the defendant, that he had sold the land, with other lands, on credit, to the plaintiff's husband; that for the unpaid purchase-money he obtained a personal judgment against the husband, who had no personal property, and, with his consent and that of the plaintiff, he purchased the tract in controversy on execution issued on his judgment, bidding the full amount thereof, and received a sheriff's deed therefor in 1855, and the husband died in 1866, is insufficient on demurrer; and the same facts are insufficient as a counter-claim, either to quiet the defendant's title or to enforce a vendor's lien. *Ib.*
6. *Same.*—*Judgment.*—*Waiver of Lien.*—Taking a personal judgment for the purchase-money of land, and selling the land on execution to satisfy it, is a waiver of the vendor's lien. *Ib.*
7. *Same.*—When the purchase-money is in any manner satisfied, the vendor's lien ceases, and can not afterwards be enforced. *Ib.*
8. *Title-Bond.*—*Executory Contract.*—*Action for Purchase-Money.*—*Pleading.*—*Insolvency.*—*Lien.*—In a suit by a vendor to enforce a lien for purchase-money against land, where he has given a title-bond for the conveyance thereof, it is not necessary, under section 275, R. S. 1881, to aver the insolvency of the purchaser. *Huffman v. Cauble, 591*
9. *Deed.*—*Tender.*—*Demand.*—Where a deed is tendered by the vendor under an executory contract, and the unpaid purchase-money demanded, and the vendee answers that he has no money, it is not necessary to state the exact amount demanded. *Ib.*

VENDOR'S LIEN.

See VENDOR AND VENDEE, 2 to 4.

VENIRE DE NOVO.

See VERDICT.

1. *Special Finding of Facts.*—*Practice.*—If a special finding of facts and conclusions of law thereon do not find the facts, but merely state the evidence, a *venire de novo* should be awarded. *Smith v. Goodwin, 300*
2. *Same.*—For such a defective finding by the court, see opinion. *Ib.*

VERDICT.

See BILL OF EXCEPTIONS, 6; PRACTICE, 3; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 8, 11 to 13, 19, 23, 26.

Venire de Novo.—*Practice.*—A *venire de novo* is awarded when the verdict is uncertain or ambiguous, or does not fully find upon the issues, or fails to assess damages. *Green v. Elliott, 53*

VOLUNTEER.

See DEED, 5.

WAIVER.

See JUDGMENT, 7; SUPREME COURT, 2; VENDOR AND VENDEE, 6, 7.

WARRANT.

See CITY, 1 to 5; TAXES.

WATER-WORKS COMPANY.

See CITY, 15.

WATER-WORKS TRUSTEES.

See CITY, 3.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 8, 19, 23.

WIDOW.

See DECEDENTS' ESTATES, 3; PARTITION, 1 to 3, 5; VENDOR AND VENDER;
WILL, 2, 3, 6.

WILL.

See INSANITY, 5.

1. *Legacy.—Devisees.—Real Estate.—Lien.—Possession.*—Devisees of land are not liable to an action for a legacy charged thereon until they have taken possession. Until then it is not due. *Wilson v. Moore, 244*
2. *Same.—Election.—Widow.*—Where it does not clearly appear from a will that the provision made for the widow was intended to be additional to her interest in her husband's lands, she must elect whether she will take under the will. Such election is a privilege to be exercised by the widow alone. Lapse of time will not affect her right to take under the law. *Ib.*
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